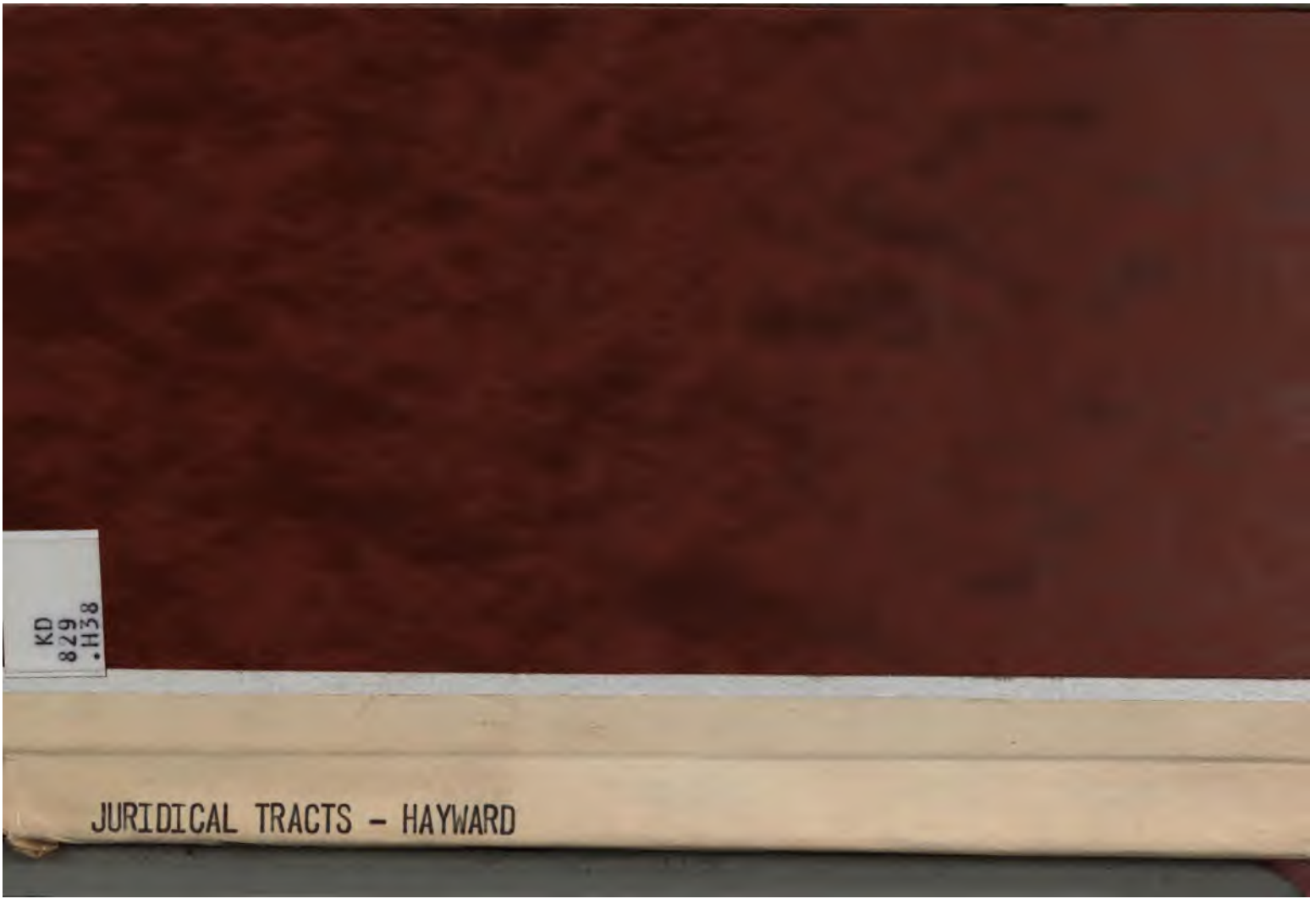

JURIDICAL TRACTS,

BY

A. HAYWARD, ESQ., Q.C.

PART II.

WILL CONTAIN

1. Remarks on the Laws relating to the Settlement and Removal of the Poor in England, Scotland and Ireland.

2. Sketch of the Criminal Courts and Procedure of France.

3. Outlines of the Criminal Jurisprudence of the leading States of Germany.

PART III.

A Translation (printed for private circulation in 1831) of Von Savigny's Essay entitled *Of the Vocation of our Age for Legislation and Jurisprudence*, with a new Introduction by the Translator.

JURIDICAL TRACTS.

PART I.

CONTAINING

1. HISTORICAL SKETCH OF THE LAW OF REAL PROPERTY IN ENGLAND.

2. THE PRINCIPLES AND PRACTICE OF PLEADING.

3. HISTORICAL SKETCH OF REFORMS IN THE CRIMINAL LAW.

BY

A. HAYWARD, ESQ., Q.C.

LONDON:
G. W. BENNING & CO., 53, FLEET STREET.

1856.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

PREFATORY NOTICE.

In April, 1828, when complaints of the dilatory and expensive forms of proceedings in English Courts of Justice were just beginning to compel general attention, Lord (then Mr.) Brougham made his memorable speech on Law-Reform, which occupied rather more than six hours in the delivery, and was not more remarkable for the greatness of the oratorical effort than for its boldness of conception and comprehensiveness of plan. To apply the striking expression of Grattan—it "struck a blow into the country which is still resounding through it," and directly or indirectly it has probably led to a greater number of important and beneficial results than any other speech, ancient or modern. The lawyers were naturally the first to feel the new impulse; and the "Law Magazine or Quarterly Review of Jurisprudence" (established June, 1828) was one of the earliest fruits of the movement amongst the younger members of the profession.

The first four numbers were edited by the late Mr. W. F. Cornish (of the conveyancing bar) and myself.

I was sole Editor from the 5th to the 64th Number (both inclusive); i. e. from June, 1829, to June, 1844, when I finally withdrew from the work. During the entire period of my connection with it, I undertook the task of reviewing the Reports of the Common Law, the Real Property, and the Criminal Law, Commissioners, as they successively appeared; and the following essays were written by way of introduction. To supply materials for a comparative estimate of the English system of jurisprudence, I also compiled accounts of the Codes, Courts, and Procedure, Civil and Criminal, of several leading European and Transatlantic States, which will shortly be republished in an enlarged and corrected form.

Temple, January, 1856.

Historical Sketch

OF

THE LAW OF REAL PROPERTY

IN ENGLAND.

(*From the Law Magazine of October*, 1829.)

HISTORICAL SKETCH

OF

THE LAW OF REAL PROPERTY

IN ENGLAND.

It was said of a great lawyer of the last century, that a simple detail of circumstances by him was better than the best argument. The same might be said of any clear detail of the rise and progress of the law of landed property in England. Explain to an admirer of things as they are the inconveniences of our complicated forms: the ever ready answer is, that due deliberation was used in framing them, and that we ought to abide by authority. But trace these forms to their origin; prove the strange contrivances and modifications of interest of which our system is made up, to be almost all attributable to customs and institutions which have long ago died out of society, or have been formally annulled by the legislature; and the inference is irresistible. The old subterfuge is instantly cut off, and the controversialist is compelled to confine himself to the present fitness of things. As the groundwork must be laid by supplying the connecting links between the simple notions of property with which unaided common sense presents us, and the highly refined and complex notions of it which experienced English practitioners may be supposed to entertain, we are obliged to begin from a point to

which they, perhaps, may refuse to return. We shall be, however, as concise as possible in the elementary parts of our task; and their collocation, at least, will be new.

Lord Mansfield once observed (and Lords Kenyon and Ellenborough agree with him)—"Generally speaking no common person has the smallest idea of any difference between giving a horse or any other chattel, and a quantity of land. Common sense alone would never teach a man the difference"(*a*). The remark has been frequently objected to; but, to the best of our experience, it is true; and not only have we found most common persons wholly ignorant of the difference between a real and a personal estate, but utterly incapable of comprehending the nature of any difference not immediately deducible from the distinctive qualities of the subject-matter of each. They may be made to understand that land, by reason of its durability, is susceptible of more enduring modifications of interest than a chattel; and that, by reason of its superior importance, more formalities in dealing with it may be advisable. They can understand, for instance, why it is best adapted for an entail, and why a deed should be required to convey it. There, however, their intelligence stops short; they cannot appreciate the difference between *possession* and *seisin*, or *tortious* and *non-tortious* conveyances; the whole learning of uses and of trusts (we mean, the purely fictitious, where no real confidence exists) remains a dead letter for them; and they will puzzle themselves in vain to find out how, whilst the beneficial interest in a man's real property with the absolute power of disposal is confessedly vested in himself, a tenural interest in it can exist in another, and the legal estate in a third. The only clue to the labyrinth is patient historical research; going back to the period when the artificial system took root, and

(*a*) Cowper, 306.

marking each point of its growth. That period dates from the establishment of the feudal policy in England, and of this, accordingly, some account must be given; yet, if there be one subject more than another which a modern writer would anxiously avoid, it is the hacknied one of feuds.

Mr. Humphreys says that the Normans "gave us not the spirit but the dregs of that singular system which has so largely influenced the law and manners of modern Europe;" and he describes the incidents of tenure as "forming in their primitive vigour rather an assemblage of unconnected institutions than parts of a general system"(*a*). It might easily be shown that his hypothesis is totally unfounded; that the system in question was received here in a highly refined state, and that the parts cohered admirably till torn asunder by positive enactment. But we heartily wish Mr. Humphreys were right; for, in that case, feudal notions could scarcely have exercised so lasting an influence, nor would it now be so hard to eradicate them. We should not find the commissioners declaring that "the scheme which has been recently proposed of entirely abolishing the doctrine of tenures would introduce universal confusion;" for, one by one, we might easily dispose of them like the separated bundle of sticks.

We cannot act on the theory, whatever trouble it may be calculated to save. The more we look for causes and principles, so much the oftener are we carried back to tenures; not, be it remembered, by guesses or conjectures, but by regular trains of logical dependencies. Forms and rules without number present themselves directly founded on, or rendered necessary by, feuds; and what follows will be scarcely intelligible unless their nature be kept constantly in mind. The subject is fairly forced upon us, and we can only repeat our promise to be brief.

(*a*) 2nd Edit. p. 4, 5.

When the northern nations overran the more civilized countries of Europe, their newly-acquired territories were distributed in the manner which seemed best adapted for military subordination. The property in all the land of the country was vested in the general or king: he conferred large tracts on the leaders, who dealt them out again in smaller allotments to their followers; every receiver or feudatory being bound, under the penalty of forfeiture, to join the banner of his immediate lord or benefactor when called upon, and, at proper seasons, to attend the court which every baron claimed the privilege of holding for managing the affairs of his district or manor and distributing justice within it.

This was the more usual, if not, at the first establishment of feuds, the only mode of holding; but when the country became quiet and the new dynasty secure, a custom grew up of granting lands for services of a fixed and more profitable description; as to hold by rent and fealty, or by fealty alone. Services, too, military by creation were frequently commuted for money; a practice conceived by Mr. Butler to have contributed greatly to the undermining of feuds, though, in our opinion, rather a sign than a cause of their decline. The kind of tenure, introduced in this manner, was called *socage;* and its characteristic is the certain character of the render; on which account it is commonly contrasted with knight service, the duties of which were necessarily uncertain in respect of the time of performance. Thus, *grand serjeanty*, whereby thet enant was bound, instead of serving in war, to do some uncertain service of an honorary nature, as to be the king's champion or other officer at his coronation; and *cornage*, which was to wind a horn when the Scots crossed the border, are each a species of knight service; whilst *petit serjeanty*, a holding of the king by the annual render of a bow, a sword or

the like; *burgage tenure* and *gavelkind*, the peculiarities of which consist for the most part of some incidental customs, are each a species of socage. This distinction is nugatory now unless as a help to description, for all other tenures (with the exception of *grand serjeanty* and *frankalmoign*)(*a*) have been, as Blackstone expresses it, absorbed and swallowed up by socage; and even of socage, the only remarkable incident remaining, is *escheat*, by which the lord is entitled to resume the possession of any lands holden of him, in case the holder shall die intestate and without heirs, or shall be guilty of felony, which is said to work the corruption and destroy the inheritable quality of his blood(*b*). But socage itself is susceptible of a twofold division; *free* socage, which is what we mean when speaking of socage in general, and *villein* socage, which we proceed to explain.

On the original distribution of territory, each lord, as may be easily supposed, retained a portion of land for the support of his own establishment. This he cultivated by the hands of a class of men called *villeins*, who seem to have occupied about the same place in society as our own West Indian slaves, and are described by Mr. Watkins as "the *captivated* natives of the conquered countries." These worked as day labourers, or had allotments assigned for their support, in return for which they were bound to discharge some mean duty or bring in a certain quantity of produce. Their allotments might be taken from them at a moment's warning; but if a villein behaved well he was generally allowed to retain his land for life, and his son, if fit to do the work, to succeed him. After several such

(*a*) The tenure, by which the spirituality held and still hold their lands; the service being to pray for the souls of the donor and his heirs, dead or alive.

(*b*) This does not apply to gavelkind, the maxim with regard to that tenure being, "The father to the bough, the son to the plough."

permissive successions, a sort of prescriptive right was obtained; the courts presumed largely in favour of freedom, and it was held illegal to deprive the tenant or to refuse the inheritance to his heir. The change was accelerated by the occasional enfranchisement of bondmen, and by its being not unusual for freemen in distressed circumstances to accept of gifts in villenage, till, by the silent operation of circumstances, this degraded and precarious occupancy acquired the attributes of property.

But, however improved upon and fixed, the tenancy is still, in terms, at the will of the lord, according to the custom; the custom varying in each manor according to the degree of indulgence with which the villeins belonging to it were formerly treated; so that each manor has now a little code or system to itself. The original character of the property is also strongly marked on the forms of transmitting or dealing with it. Servile matters being beneath the notice of freeholders, the villeins formed a court by themselves, at which the baron's steward presided, and all appropriations of the before-mentioned allotments were directed and registered by him. When any part of the demesne lands was surrendered by one villein and granted to another, or when, in case of death, the allotment of the father was confirmed to the son, a memorandum of the circumstance was duly entered in the rolls of the manor, and a copy of the entry being the only evidence of title in the tenant's possession, he was said to hold by copy of court roll, and the tenure received the name of *copyhold* (*a*).

Lands in *ancient demesne* may be described as the copyholds of the king, consisting, according to Blackstone, of

(*a*) Lord Loughborough (Dougl. 724, note 2,) denied that copyholds sprang out of villenage. He founded his argument on the fact of there being in Germany, in his time, both villeins and copyholders. The argument strikes us as strangely inconclusive.

those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor or William the Conqueror. The royal tenants have had from time to time many privileges and immunities conferred upon them, and these they still retain; but they convey, like common copyholders, through the instrumentality of the steward or lord.

These are all the modern English tenures: if any given spot cannot be shewn to be serjeantry, frankalmoign, gavelkind, burgage tenure, copyhold, or demesne land, it is to be taken for plain socage; for all the land in the kingdom is *holden*, and, on failure or corruption of the tenant's blood, will escheat to some intermediate lord, in case any such can substantiate a claim (which is extremely difficult for one whose manorial rights have been permitted to lie dormant for any length of time), or to the king, as lord paramount and *ultimus hæres* of every one.

We have described tenures as if they were of home production; but the mode in which the doctrine of holding became general in England is still a subject of controversy, some writers contending that it partially prevailed amongst the Saxons. But though traces of it are certainly discoverable amongst their historical remains, it was not generally and constitutionally received till after the Conquest; and the better opinion seems to be, that all the lands of Harold's party which accrued to William by forfeiture being divided and subdivided as feuds, a large part of the kingdom was immediately subjected to the policy in question; and that about the 20th year of the Conqueror's reign, either in compliance with his wishes or with the view of inducing him to dismiss his foreign mercenaries and depend entirely on themselves, the principal landholders attended the king at Salisbury, in due form became his vassals, and agreed to do service for their lands, so that

thenceforth allodial (or totally independent) proprietorship ceased. They soon had reason to repent of their subserviency, though not on Mr. Humphreys' hypothesis, for an over-strict adherence to principle was the prominent cause of the mischief that ensued. Our ancestors, or at any rate the greater part of them, being under no real obligation for their lands like pure proper beneficiary feudatories, merely meant to subject themselves to military service, and anticipated no further exactions. The jurists of the time, however (casuists by a double right, as Normans and as priests), persevered in putting these *quasi* feudatories on precisely the same footing with real feudatories, and taking the notion of a gift as their premiss, reasoned from it to the most oppressive conclusions. Hence the multifarious impositions which, after exciting innumerable disturbances, were finally swept away at the Restoration, but which it is not now necessary to discuss, as their influence perished with them. Hence the less obvious but still more fatal doctrines which, interwoven with the very texture of our laws, have been warping and entangling them for centuries, and seem likely to adhere to them for ever. In what manner and to what degree so injurious an effect has been produced it is absolutely necessary to know, and to explain this we shall mention a few more particulars of the tenural institutions, of which merely the surface has hitherto been seen.

It must be borne in mind then, as an important part of their history, that feuds, at their first establishment, were only granted for life: some writers speak of them as mere tenancies at will. The first approach to the endowing of land with the heritable quality seems to have been the favour naturally shewn by the lord to the family of his deceased vassal, some member of which, if able to discharge the services, was commonly nominated as the

successor, on which a sum of money or an acknowledgment in some shape or other was exacted for the renewal. Custom in a rude age is more operative than legislation; and this permissive succession is supposed to have grown into a right, as in the before-mentioned case of villenage. But to preclude the possibility of dispute and leave no option in the lord, it became customary to particularize in the charter of donation the quantity of interest conveyed. Hence the practice of inserting words of inheritance (as to a man and his heirs) to convey what we now term a fee-simple.

The mode of tracing the heir was nearly the same as now (1829), the lineal descendants of the last proprietor taking first, and then such of his collateral relations as could prove themselves descended from the original grantee. Fearne, in his Legi-graphical Chart, describes primogeniture as established in respect of lands held by knight service from the introduction of that mode of holding in England, but his authorities do not support the position; and, according to Reeves (*a*), the right of primogeniture, so low down as the reign of Hen. I., was so feeble, that, if there was more than one son, the succession was divided, and the eldest took only the *primum patris feudum*. In the reign of Hen. II. however, lands held by knight's service were no longer partible, and socage land, from analogy, soon ceased to be so. About the same period we find females succeeding, in default of males of the same degree, in both species of tenure, though certainly excluded by the original constitution of fiefs. Lineal ancestors, for reasons to be subsequently explained, were not admissible; but it would seem that the half-blood could inherit lands of purchase till the time of Hen. VIII.

The most striking quality of feuds remains to be mentioned. Neither the lord nor the tenant could alien without

(*a*) Hist. of Engl. Law, Chap. 2.

the consent of the other, which neither was likely to accord so long as the disturbed state of the country made it their common interest to preserve the ties of obedience and protection. But the same causes which led to the compounding of military services for money payments facilitated the obtaining of licences to alien, which also were often stipulated for at the making of the grant (as to a man, his heirs *and assigns*), a style still employed by conveyancers, though it must have become useless soon after its adoption; for from a law of Hen. I. (in which nothing is said about the naming of assigns), we find that purchasers were quite free to convey, though lands of descent could not be given out of the family, a rule still further qualified by the time of Hen. II., when inherited lands might be aliened in part. These alienations being generally made in the shape of subinfeudation, an extremely complicated system of holdings was established, and lords were frequently deprived of their services, or left in doubt to whom to resort. By Magna Charta, therefore, it was enacted, "that no freeman should give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him;" and a still more effectual remedy was applied by the stat. 18 Edw. I. (commonly called the statute of *Quia Emptores*), which provided that the party, thenceforth enfeoffed of lands, should hold them of the superior lord of the fee in the same manner as they were held by the feoffor (*a*). By this statute licence was given to every freeman to sell his lands, and the laws of property, one would naturally suppose, would now begin to be rational. But

(*a*) It is generally considered that since this statute a manor cannot be created. Some, however, seem to think that it may, by granting in tail or for life, in which case the donee would hold of the donor—and that, if there were tenants enough, a court might be held. (Watkins on Cop. 22.) Copyholds, it is admitted, could not be created now, as they depend on custom.

just as the old fetters were about to give way, a newly invented set was put on. The emancipatory provision was completely neutralized by an Act which had shortly preceded it.

Along with other estates of inheritance, fees restrained to particular heirs, exclusive of others (as to the heirs of a man's body, in exclusion of collaterals) came into vogue. These estates were called conditional fees; the understood condition being, that, in default of lineal descendants of the donee, the land should revert to the donor; and (in accordance with the general rule, that, when a condition is performed, it is thenceforth entirely gone) the donee's estate, as soon as he had issue, was held to have become absolute; at least, so as to enable him to alien or forfeit it as against the reversioner and issue, and to charge it as against the latter. This construction being found to render family settlements abortive, the statute *De Donis* (13 Edw. I. c. I.) was passed, by which the estate was deprived of its conditional quality, it being provided that, in the case of a tenement given to a man and the heirs of his body, such tenement should, at all events, go to the issue, if any, or, in default of issue, revert to the donor.

The desire which seems natural to all men, and is always strong in the members of an aristocracy, to perpetuate their possessions in their descendants, caused this law to be very generally acted upon, and through its instrumentality nearly all the lands of the kingdom were taken out of commerce and made the subject of *entail*, as this new species of estate was denominated. To complete the catalogue of direct restrictions, it should be stated that the statute of *Quia emptores*, by which a general liberty to alien was given, did not include devises. These were still, and for a long time after, prohibited; except in some few districts or boroughs, where a customary right of devising prevailed. Neither

was land chargeable with debts, except under a statute staple or merchant (*a*); and alienation in mortmain was all along forbidden. The selfsame barons, who saw no harm in entails, were constantly alive to the impolicy of permitting the circulation of property to be checked by its vesting in corporations, and a protracted struggle between the legislature and the clergy was the consequence. In fact, it is the fashion to attribute almost all the contrivances by which the restrictions we have been describing were eventually undermined, as well as the practice of subinfeudation, to the inventive powers of the priest; an error, if it be one, by no means material; for in whomsoever the contrivances originated, we shall have an equally good argument against them. But it may be as well to observe (as will be seen when we come to them) that the contrivances in question are just as well adapted to evade one sort of prohibition as another, and that the best authorities are by no means consistent as to either the dates or the causes of their introduction. This, however, by the way. Before we sketch the mode in which the modern system grew up, as a sort of excrescence on the old, we must take a rapid view of the primitive state of conveyancing, for its slender capabilities and ceremonial character must be added to the catalogue of checks.

During the early days of feuds, every transfer took place in open court, through the hands of the lord, as copyholds pass now; and in allusion to this species of induction, Lord Mansfield once remarked—"Whoever will look into the practice of other countries where tenures subsist, will

(*a*) The writ of *elegit* was given by 13 Edw. I., under which half a debtor's lands might be put into the possession of the creditor till he had paid himself out of the profits. The above-mentioned prohibition to charge led to the introduction of *mortgages*, which are absolute conveyances conditioned to be void on repayment of the money advanced within a time specified.

easily comprehend, that at the time I speak of, it might be as notorious who was feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation." After investiture was disused, the parties, when an immediate freehold in possession was to be conveyed, came upon the land with their witnesses, and an actual transfer took place, the one surrendering and the other receiving possession. This ceremony was termed a *feoffment;* the delivery of possession (technically termed *livery of seisin*) was the essential part of the transaction, and the deed was subsequently drawn up as a memorandum or authentication of what had taken place(*a*); and though we are now apt to consider the deed as the essence and livery as the accident, the latter is as necessary as ever. With regard to things incorporeal, as advowsons, commons, rents, reversions, &c. an actual delivery was impracticable. These, therefore, were allowed to pass by *grant;* a term used indiscriminately, in common parlance, to denote any sort of donation, but, in strictness, exclusively appropriated to transfers of incorporeal hereditaments. A grant, therefore, was merely a deed (or instrument under seal) complete in itself from the moment of execution, except when a reversion or remainder formed the subject matter; in which case, attornment on the part of the tenant (i. e. his assent to the transfer) was necessary(*b*).

The only other original conveyance was the *lease*, which we need not define; neither do we think it necessary to describe what are termed derivative conveyances,—release, confirmation, surrender,—by which transactions between parties already interested in the property were carried on,

(*a*) This accounts for the deed of feoffment being in the past tense, "Know all men that I have, &c." (See the form, 2 Bl. Com., Appendix, No. 1.) The clause in the past tense, now inserted in almost every other description of deed, was probably inserted from analogy.

(*b*) Attornment was dispensed with by 4 & 5 Ann. c. 16.

but which, at that time, were never used for the general purposes of transfer. Deeds of exchange and partition, with assignments and defeazances, may be passed by for the same reason; so that, to form an estimate of the disposing powers of proprietors under the primitive system, it is only necessary to ascertain the capabilities of feoffments and grants; or, taking into consideration the comparative unimportance of incorporeal property, of feoffments alone.

In the first place, then, unless a man were willing to part with his whole property during lifetime, a very roundabout mode of settlement must have been resorted to. Thus, if he wished to create an estate for life or in tail in himself, he was obliged to convey the whole fee to a third person, and take back the interest required. In the second place, it is clear that the necessity of livery (to say nothing of the feudal rule that the fee must always be full; in other words, that there must always be some one to do service to the lord and answer the demands of strangers) rendered the creation of future and shifting fees impracticable. Estates could only be limited in possession or by way of remainder: although a condition might be annexed, only the grantee or the heir could enter for the breach of it; and although a remainder might be made to depend on a contingency, yet, if the preceding estate determined before the occurrence of the contingency, the ulterior limitation became inoperative. Not merely was a contingent remainder liable to be defeated by the death or forfeiture of the immediate freeholder, but the remainderman's chance of succession might be destroyed by the freeholder himself. On the ground of the notoriety of the transaction, the feoffment of a freeholder in possession was held capable of passing a fee, although the feoffor were only tenant for life; and he might thus displace the whole line of estates of which his own was the connecting link. We are stating the effect,

not discussing the justice, of this doctrine. We can only say that, " We must lament that the law is such. Our ancestors got into very odd notions on these subjects; and were induced by particular causes to make estates grow out of wrongful acts" (*a*).

In addition to the estates or interests in lands already mentioned, there were two growing out of marriage—Dower and Curtesy appear to have been fixed as early as the reign of Henry I. The law of Dower entitles the wife to a third, for life, of all lands or tenements in which her husband was seised of an estate of inheritance during coverture; whilst, on the other hand, where a man's wife is seised of an estate of inheritance in lands or tenements and she has issue by him born alive and capable of inheriting the property, he is entitled to hold it for life, as tenant by the curtesy of England. The mode in which dower operated vexatiously may be collected from the above description. The wife's right accrued on all heritable lands whatever of which her husband was even temporary owner, though he should buy one day, and sell the next; during coverture she was disqualified from joining in any contract or conveyance whatever and, consequently, from releasing her right, until the introduction, to be presently mentioned, of fines and recoveries.

Such was the condition of real property at the time to which we have brought down the history of restrictions (18 Edw. I.); which, even in the rudest age, ere land had begun to be contemplated as a subject of barter, must have been extremely vexatious; and many of the following modes of evasion were probably known and used occasionally, though not formally adopted into the system. But their precise dates, as formerly remarked, are unimportant, so long as we describe them with sufficient

(*a*) Per Sir J. Mansfield, 1 Taunt. 613.

exactness to make the modern technicalities intelligible. The invention, or, more correctly speaking, the perversion of terms of years, is the species of trickery which we shall take first.

A lease was, in its origin, a mere contract between the landowner and the husbandman; and as even now lands are seldom let to farm for more than fourteen or twenty-one years at a time, it is to be presumed that, so long as the lease was confined to its legitimate object, the term was equally limited. For this reason, as well as on account of the low repute in which the cultivators of the soil were held in feudal times, terms were never looked upon as real property; and the rules relating to it did not extend to them. The clergy ("who," says Coke, "were in this to be commended, that they had ever the best learned men in the law that they could get of their counsel") are said to have been the first to take advantage of the distinction. When gifts of *land* to religious houses were prohibited by Magna Charta, they adopted the practice of taking long terms at a nominal rent; and these, although palpably evasive, not being what the law termed *land*, were held not to be included in the terms of the prohibition. The example has been largely followed, and terms form an important part of the machinery now in use for the transfer and apportionment of property: yet a lease for a thousand years at a peppercorn rent, operating confessedly as a transfer of the whole beneficial interest, is of little more importance in the eye of the law than was a precarious occupancy at rack rent five hundred years ago. Whether this anomaly should continue?—whether leases beyond a certain length should be prohibited, as in France, or be treated as freeholds on exceeding an assigned limit?—will be important questions hereafter. We have only now to state that the clergy were soon excluded from the advantages of the invention, and

that they were induced by the exclusion to resort to a new and still more important one.

It was provided by 7 Edw. I. that no person, religious or other whatsoever, should buy or sell, under colour of a gift or *term of years*, or by means of any other title receive, or by any other mode, art or contrivance appropriate, lands or tenements in mortmain, under pain of forfeiture; "and a man," says Coke, "would have thought that this should have prevented all new devices, but they found out also an evasion of this statute; for it extended but to gifts, alienations or other conveyances made between them and others, and therefore they gave over them; and, pretending a title to the land that they meant to get, brought a *præcipe quod reddat* (i. e. commenced an action) against the tenant of the land, and he, by consent and collusion, should make default, and thereupon they should recover the land and enter by judgment of law, *et sic fieret fraus statuto* (*a*)." A fictitious suit, thus carried on to judgment, was called a *recovery;* but a shorter process was frequently employed. The party to whom the land was to be conveyed commenced an action in the same manner; but, instead of going through the mockery of a defence, the tenant at once admitted the justice of the demand, on condition of the suit being discontinued. Leave to discontinue was obtained accordingly, and an acknowledgment on the part of the tenant that the land was the property of the fictitious claimant, was formally entered on the records of the court. This process was called a *fine*, because it put an end to the controversy; and *bonâ fide* compositions of the kind are said to be of equal antiquity with the law itself, which renders it difficult to state when the irregular employment of them began. The statute 13 Edw. I. is levelled against recoveries alone. It directs that when default should be made

(*a*) 2 Inst. 75.

in actions brought by *corporations*, it should be inquired by the country whether the demandants had right or no, and that if they had not, the land should be forfeited. Other actions were left as before, and recoveries remained to be used in undermining an institution which neither king nor commons dared openly attack.

The presumption in the case of a recovery being that the recoveror came in by a title paramount, a necessary deduction (arguing upon the fictitious, as it were a real, proceeding) was, that all claiming under or by the same right as the tenant should be deprived of their estates or expectations equally with himself. On this principle the lessee of the tenant was (until Hen. VIII.) held to be at the mercy of his landlord; and, as soon as the construction could be ventured on, the statute *De donis* was virtually repealed. So early as the reign of Edw. III. (*a*) the judges intimated an opinion that it might be evaded in this manner; but it was not until the reign of Edw. IV., when the aristocracy were too feeble to resist, that, taking their cue from the crown, they solemnly adjudged the recovery a bar to an entail. They are thought to have manifested great astuteness in justifying their decision, but we quite agree with C. J. Willes, that, "when men attempt to give reasons for common recoveries, they run into absurdities," and as their primary assumption (the recompence in value) has no more foundation in reality than the right of the supposed claimant, whilst, on the other hand, their ingenuity cannot be appreciated without a more extended knowledge of a real action than could be fitly communicated here—for these reasons we shall pass over the arguments in question, content with having stated the facts. The decision was generally acted upon: the recovery became a usual mode of conveyance for tenants in tail;

(*a*) Mary Partington's case.

and by the combined effect of two statutes (4 Hen. VII. c. 24; Hen. VIII. c. 28), the same kind of force was conferred upon *fines*. The precise difference between fines and recoveries, and the operation of fines as a bar, need not be explained here. We have only to add, that, besides their effects upon entails, they have long been the only assurances by which a married woman can convey an interest or release a right during her husband's lifetime; and that, on account of the solemnity of the proceeding and the authority attached to a record, they have been allowed the effect of a feoffment in creating tortious estates.

To bring down the history of fines and recoveries to the period at which they were definitely fixed, we have been induced to anticipate a little. We must now go back to the introduction of uses, which, according to Coke, were invented by the clergy on their being prevented from employing recoveries. On the other hand, Lord Bacon remarks, in allusion to this speculation of Coke, "Yet I hold this not so much the reason of uses as another reason in the beginning, which was that lands by the common law were not testamentary or devisable;" and we find the commissioners declaring that "the adherence to the common law, which forbids the creation of future executory shifting estates, early introduced the practice of conveying to uses." Of these hypotheses we think the last the worst; and all are faulty in attributing to a single cause an institution, the germs of which may be found in all civilized communities, and which many causes contributed to bring to maturity in England. Bacon himself states, at the commencement of his Reading on the Statute of Uses, that "an use is no more but a general trust when any one will trust the conscience of another better than his own estate and possession, an accident which hath been and will be in all

laws." That a man, for instance, about to go abroad, or engage in any hazardous enterprize, should make over his property to a friend upon an understanding that it should be conveyed back on his safe return, or disposed of in a manner specified in case of accident, is easily supposable in any country whatever; and when once the notion of a merely nominal ownership is conceived, the infinite variety of purposes it might be made to answer will be understood as they occur. It will be seen that no legal liability of the beneficiary proprietor can, in such circumstances, attach upon the land, and that all restrictions and prohibitions are insufficient as against this description of interest so long as good faith be observed; just as we find it impossible to prevent simoniacal, usurious and gaming contracts, whenever men think fit to abide by them. But to make these propositions more clear, it may be as well to present the reader with the precise definition of a perfect use.

It was said to consist of three parts: 1. That the feoffee would suffer the feoffor to take the profits: 2. That the feoffee, upon the request of the feoffor, or notice of his will, would execute the estates to the feoffor or his heirs, or any other by his directions. 3. That if the feoffee should be disseised, and so the feoffor disturbed, the feoffee would reenter, or bring on an action to recontinue (*a*).

The third (the defence of the land) may be passed by; and of the first the most important consequence was, that any undisposed part of the beneficiary interest resulted to the feoffor, and was termed the *resulting use:* a man was thus enabled to create, by one conveyance, a particular es-

(*a*) Per Walmsley, J., quoted by Bacon. Although a feoffment alone is mentioned, it is not meant to exclude other modes of conveyance. It may also be prudent to state, that, in speaking of the fiduciary interest antecedently to the Statute of Uses, we use the terms *use* and *trust* indiscriminately.

tate in himself. The second requires particular attention, as the most important corollaries are included in it.

When the feoffee executed an estate to any one by the direction of the feoffor, the transaction was virtually and in effect a conveyance by the latter to such third person; the existing law, therefore, must have been transgressed or evaded, unless both the party directing, and the party to whom the use was executed, were legally qualified to convey and take respectively, and unless the estate were of a description authorized by law, and the notice or direction attended with the ceremonies of a deed. In no one respect, however, were legal analogies pursued, nor legal prohibitions and incapacities attended to. The feoffor himself was necessarily a person competent to convey; but he might authorize an incompetent person, as a married woman or an infant, to direct the disposition of the use, and such direction was deemed equally binding as if it had proceeded immediately from the feoffor: in technical language, he might invest such person with a *power* to appoint in what proportions, and by whom, the beneficiary interest of the property should be enjoyed. With regard to the party to take, the law was just as easily set aside; so that a traitor, an alien, or a corporation, might enjoy the profits of lands: and as to the form of the direction or notice of intent, the feoffor or the holder of a power might give the direction, or intimate his intent, by parol. Then a limitation might be made dependent on any species of contingency, or the feoffor might reserve to himself, or vest in another, a *power* of revoking any former disposition and re-appointing the use. *Springing* and *shifting* uses were thus introduced; and as a man might direct that, on his own death, the whole or any part of the beneficiary interest should go, or the legal estate be conveyed, to a particular person named, a testamentary power was indirectly acquired. Uses, therefore, have been

not unaptly compared to privileged places or liberties; "for, as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in the land." The nature of these titles, with the various evasive purposes to which uses were applied, are recapitulated in the preamble to the statute (27 Hen. VIII. c. 10).

And here it will naturally be asked how (as there must have been a legal tenant somewhere) the feoffor or beneficial proprietor, whilst avoiding legal claims on himself, avoided letting in legal claims on his friend.

If, as we are told, the trustee was, in the eye of the law, the absolute owner of the property (so much so that the real owner would have been deemed a trespasser had he entered without the trustee's authority), is it not a necessary deduction that, if the trustee incurred a forfeiture, or did any other act affecting the property, the land would be liable for his defaults and incumbrances, and the trusting party suffer accordingly?

It certainly was so in the early days of the use; and nothing more strongly illustrates the harshness and impolicy of the old feudal restrictions than the general adoption of so perilous a practice. There were modes, however, of lessening the risk. It seldom happened that the feoffment was made to a single person; the feoffees were numerous, and when their number was reduced, by death or secession, to one or two persons, a new feoffment was made to other feoffees to the subsisting uses (*a*). Indeed, the legal estate and use were so distinct, that it was usual for a man take a conveyance to himself and others to the use of himself; and the legal estate was considered to remain in him wholly distinct from the equitable right to the profits (*b*). Thus

(*a*) Co. Litt. 191 a, note.

(*b*) Sugden's Edit. of Gilbert's Uses, Introd. p. 43.

many legal liabilities were prevented from attaching and great care was taken in the choice of trustees. "It is no marvel that you find no case before Edw. IV. his time of contingent uses where there be not six of uses in all; and the reason I doubt was, men did choose well whom they trusted, and trust was well observed; and at this day in Ireland, where uses be in practice, cases of uses come seldom in question, except it be sometimes upon the alienation of tenants in tail by fine, that the feoffees will not be brought to execute estates to the disinheritance of ancient blood" (*a*).

It was by the aid of the Court of Chancery, however, that uses were finally fixed, for they did not much abound until the reign of Rich. II., when the writ of *subpœna* is said to have been first brought to bear upon trustees by John Waltham, Bishop of Salisbury and Chancellor. It being clearly inequitable for a man to keep for himself what had been bestowed upon him with a widely different intent, Waltham made this a plea for assuming the cognizance of all merely equitable interests and, as might have been expected from the nature of the subject matter, with little regard to legal restrictions (*b*). Neither he nor his successors (who till the appointment of Sir T. More were uniformly ecclesiastics) could, indeed, contrive to benefit their cloth; for by 13 Rich. II., the mortmain acts were extended to uses; nor could they well execute uses in traitors and

(*a*) Bacon's Reading.

(*b*) The causes which led to the legal establishment of uses in Rome are singular enough. In the case of the *fidei commissum*, which comes nearest to a use, cestui que use had for a long time no remedy at all. But in the time of Augustus it became customary to bequeath in the form following: "Hæredem constituo Caium, rogo autem te, Caie, per salutem (*or* per fortunam) Augusti, ut hæreditatem restituas Seio." Whereupon Augustus took the breach of trust to sound in derogation of himself, and made a rescript to the prætor to give remedy in such cases. This is Bacon's account of the matter.

aliens; but they enforced resulting and springing uses, powers, testamentary dispositions, and parol limitations, insisting only on the necessity of a consideration. "In the Queen's case," says Bacon, quaintly reasoning on this essential, "a false consideration, if it be of record, will hurt the patent, but want of consideration will never hurt it; and yet they say that the use is but a nimble and light thing; and now contrariwise it seemeth to be weightier than anything else: for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration; but you shall never find a reason of this to the world's end, in the law: but it is a reason in chancery, and it is this: That no court of conscience will enforce *donum gratuitum*, though the interest appear never so clearly, where it is not executed or sufficiently passed in law." When, however, a consideration could be made out, not merely was the Court of Chancery ready to give effect to a use when created, but even to divorce the legal from the beneficiary estate, and be itself the creator of a use; and it thus originated two new species of conveyance.

When the legal owner bargained or contracted with a purchaser for the sale of his estate, without actually conveying it, equity converted him into a trustee for the benefit of the purchaser, and raised a use accordingly. A contract of this kind (and it might be made by parol) was called a *bargain and sale;* and a consideration of money, or some other thing of value, was essential. Again, it was not unusual for a man in contemplation of marriage, or from other motives, to agree to settle his estate upon his kindred. Here, again, equity raised a use, and treated him as a trustee for those whom he had thus pledged himself to endow, if within the fourth degree of kindred, or if the agreement were made in consideration of marriage. This was termed a *covenant to stand seised.*

But although the rules of real property were thus generally infringed upon, in some few cases they were still attended to. Thus, the use was allowed to take the inheritable quality of the land out of which it arose; gavelkind uses being descendible to all the sons equally, and borough-English uses to the youngest sons. But the marital rights (*dower* and *curtesy*) were not inforced in equity; on which account it became customary for the wife to stipulate for a certain maintenance beforehand, which was the origin of *jointures*.

Whilst the Court of Chancery was thus employed in bringing a new system to maturity, many statutes were passed to remedy its particular inconveniences. Uses were made available to creditors; as also to remaindermen, when particular tenants assigned over in trust, in order to commit waste with impunity. It was provided that certain real actions might be brought against receivers of profits; wardship was given to the lord as if the legal fee had descended; and one statute (1 Rich. III.) went the length of declaring that all conveyances by the *cestui que use* should be good against him and all persons claiming for his benefit, which is said to have increased instead of diminishing the mischief, as clashing dispositions were henceforth made by the cestui que use and the trustee. A more comprehensive remedy was imperatively required, and the legislature at last attempted to apply one. In the 27 Hen. VIII. the statute called *par eminence* the Statute of Uses, was passed; and every clause of it should be carefully conned over. It is too long to quote, and we have only room to state, that after an ample recapitulation of the real or fancied inconvenience of uses, it enacts, "That where any person or persons stand or be seised, or hereafter shall happen to be seised of and in any honours, manors, &c. &c. lands or hereditaments, to the use, con-

fidence or trust of any other person or persons, or body politic, that any such person and persons, and bodies politic, so having such use, shall henceforth stand and be seised, and adjudged in lawful possession of and in the same honours, &c. lands and hereditaments of and in such like estates as they had in the use, so that the estate of such person or persons seised should be thenceforth in the *cestui que use*." This statute was immediately followed by another, declaring that no land should pass by *bargain and sale*, unless by writing indented and enrolled (*a*). Five years after, too, one main object of the legislature in passing the statute of uses, the prevention of devises, was given up; and landowners were authorized (with some immaterial exceptions) to devise all their socage and two-thirds of their knight-service lands; which, when at the Restoration all military tenures were turned into socage, made all the lands in the kingdom devisable. We mention these things here to avoid the necessity of retracing our steps. We now proceed with the history of uses.

It has been made, and still remains a question, whether the legislature did or did not intend to abolish uses and trusts; so that thenceforth none but legal estates should exist. We shall not engage in the controversy, as it is enough to know that no such effect was produced; since means were hit upon of keeping the beneficial and ostensible ownership as distinct as ever.

In the first place, the statute was held not to extend to a use upon a use; thus, in the case of a conveyance to A. to the use of B. to the use of C., the use to C. was not operated upon by the statute. In the second place, the enactment is confined to persons *seised*, a term appropriated to freehold estates; so that, although terms for years might be created by way of use, a use declared on an actually

(*a*) 27 Hen. 8, c. 16.

existing term (of which the owner was only said to be *possessed*), was not within the scope of the enactment. For the same reason, copyholds, though frequently surrendered to uses, are not within it; nor could it take effect in cases in which the performance of the use, trust or confidence necessarily implied the trustee's continuing in possession and receiving the profits of the estate; as in the instance of a trust for accumulation or sale. Secondary uses, therefore, uses on terms, uses on copyholds, with special uses, were left as formerly to the cognizance of equity, and were thenceforth enforced under the denomination of trusts. We are cautioned, however, against supposing that trusts are now what uses were formerly. A modern trust is admitted to resemble a use before the statute, in being a mere fiduciary interest, distinct from the legal estate; but, it is said, "if there is no difference in the principles, there is a wide difference in the exercise of them. The elements and principles of geometry were the same in Euclid's time as in Sir Isaac Newton's, though, in the latter's, the use of them was much enlarged" (*a*).

Certainly a high degree of care was necessary to prevent two rival systems, in the same country, from producing irretrievable confusion; yet the principle of harmony, in the discovery and application of which the later chancellors are supposed to have improved upon their predecessors, is not quite so uniform in its operation as that which Newton found out for the spheres. The improvement consists principally in a somewhat closer adherence to the maxim that "equity followeth the law;" than which, says Mr. Butler, there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions. In accordance with it the legal canons of inheritance have been applied to trusts, as formerly to uses; not even except-

(*a*) 1 Bl. Rep. 180.

ing those which are generally deemed inequitable, as the exclusion of the half blood and of the ascending line; and the legal division of estates was admitted into estates of inheritance, freehold, and less than freehold estates in possession and in remainder,—in joint and in several tenancy. Fines and recoveries also were allowed to operate upon trusts; and the same rules, with regard to perpetuities, have been followed in equity as at law. These were long uncertain; but at length a limit was fixed, with reference to the period for which a property was tied up by the common mode of settlement; which gave a life estate to the father, with remainder to the eldest son in tail, with remainders over. Under such a settlement, as soon as the son attains twenty-one, the property may be disposed of in fee by the son and father jointly, if the father be living, or by the son alone if the father be dead; so that the utmost length of time during which alienation is restrained, is during a life or lives in being, twenty-one years and (in the case of a posthumous child) between nine and ten months. By analogy, therefore, a substitutionary estate limited on a fee (for the rule does not extend to limitations on estates tail, which may be cleared away by a recovery) must be so limited as to take effect, if it take effect at all, within a life or lives in being, and twenty-one years and nine or ten months afterwards. It is at present doubted whether the superadded period be an absolute term of extension or no(*a*).

(*a*) Lord Mansfield gives the following account of the rules against perpetuities:—"At common law the only modification of estates expressly limited was by conditions. The Statute of Uses introduced more qualifications of estates expressly limited. About the reign of Eliz. and Jac. I., many cases, in odium of perpetuities, were determined to prevent and defeat such an application of the Statute of Uses. The courts leaned against contingent limitations over; but having gone a great way on that side, they began to think they went too far. New devices were contrived at the time of the troubles and practised after the Restoration; trustees to preserve contingent

In one important particular, the maxim, that equity follows the law, has been lost sight of. Equitable estates are subject to curtesy but not to dower; a state of things, it has been observed, which would probably have been reversed, had women, instead of men, presided in the Court of Chancery. This anomaly has been greatly instrumental in multiplying trust estates; it being customary for purchasers to take by way of secondary use, to prevent the rights of their wives from attaching.

The facility with which property may be withdrawn from the jurisdiction of the common law courts provoked Lord Hardwicke's celebrated assertion, that "a statute, made upon great consideration and introduced in a solemn and pompous manner, has had no other effect than to add, *at most*, three words to a conveyance;"—an assertion which has since obtained a sort of prescriptive authority; the sceptical merely objecting that his lordship ought to have allowed for the excellence of the equitable system to which the statute gave rise. His dictum, however, is in every point of view untenable; for (to say nothing of its temporary effects—on the testamentary power, for instance) the Statute of Uses has exercised a greater influence on legal than even on equitable estates. The latter, we are bound to suppose, would have gone on improving with the general improvement of society had no such statute been passed; but had no such statute been passed, the additional powers which uses have conferred upon ownership could not have been resorted to except through the medium, and subject to the inconveniences and risks, of a trust; whereas, as things stand at present, a proprietor may contrive to exercise most of these powers, to make secret transfers and create shifting

remainders and executory devises. It is not long that the bounds of them have been settled: it was in my time that the courts first held they might wait during a life in being and twenty-one years after."—1 Coll. Jur. 235.

estates, without separating the legal and equitable ownership, or placing his family under the protection of a court, for which the motto of Dante's Hell, "Lasciate ogni speranza," has been borrowed by one of its most intelligent practitioners (*a*). To show the result, we have only to compare the present state of conveyancing with its state just after the passing of the statute, a comparison which will enable us to introduce the few historical details which yet remain to be given.

Conveyances, just after the Statute of Uses, consisted of feoffment, fine, recovery, bargain and sale, covenant to stand seised, grant, and lease and release.

Feoffments, fines and recoveries, being public acts and operating by actual transfer, were supposed to afford little room for fraud; although, so long as uses might be declared by parol, the common results of underhand transactions were experienced. To remedy this, the Statute of Frauds requires all declarations of use to be in writing and signed by the person declaring them.

The bargain and sale enrolled, though unobjectionable in respect of publicity, was ill adapted for settlements; it being necessary for every one taking a use under it to pay a valuable consideration. Neither limitations to persons not *in esse*, therefore, nor powers of leasing, could be introduced.

The covenant to stand seised dropped out of use from causes of the same description. The consideration of blood or of marriage was necessary, so that none but members of the covenantor's family could take under it. Powers of leasing, therefore, were excluded; nor, what was sometimes equally inconvenient, could any but his relatives be appointed trustees.

Grants of corporeal property, as we formerly observed, were incomplete without attornment. The statute of Anne

(*a*) See the title-page of Mr. Cooper's French Letters.

dispensed with that ceremony; but, at the time alluded to, it was indispensable.

As the Grant was the mode of transfer where the immediate tenancy was in some third person distinct from both vendor and vendee, a Release was the mode where the vendee or person to take was himself in possession. But he must have been really so; otherwise, a regular lease had to be made out, and the proposed purchaser was obliged to enter and become possessed of his term before the release could operate to enlarge it into a fee; and thus, except between a landlord and a bonâ fide lessee, conveyance by Lease and Release was a troublesome affair.

On the whole, therefore, it was hardly possible to convey without some sort of publicity. The precise disposition might be kept secret; but it was always known whether a property had been dealt with: purchasers were put upon their guard, and generally knew where information could be had, as well as what doubts required clearing up.

This state of things was totally reversed by the ingenuity of a private practitioner. Bargains and sales of freehold interests, as before mentioned, required to be indented and inrolled; but bargains and sales of terms were not included in the statute of inrolment on account of their comparative insignificance. A person, therefore, in the legal seisin of the land might bargain and sell, and thereby raise a use for a year or years by a secret instrument; and, to the use thereby raised, the statute so effectually carried the possession as to make the lessee or bargainee capable of receiving a release, without the formal entry requisite to give effect to a common law demise. Serjeant Moore has the credit of inventing the contrivance, which it took, however, some time to fix; many eminent lawyers doubting whether the statutable and constructive was tantamount to corporal possession. These doubts have gradually worn out, and

the Lease and Release is described by the commissioners as the almost universal mode by which property is conveyed at the present day, whether by way of sale, of settlement, or of mortgage. The result is that the old common law system, the characteristic of which was notoriety, has been entirely superseded, instead of continuing to co-exist with the new; and this result, with all due deference to Lord Hardwicke and his followers, is wholly owing to the Statute of Uses.

With leisure for the task, it would not be unamusing to speculate on the probable consequences to society had the statute proved really inoperative,—had it left common law estates as it found them, or had even Serjeant Moore's invention remained unknown. One is almost tempted to think that the Court of Chancery, being then the only court in which secret and substitutionary dispositions could be enforced, would have gradually absorbed all the land in the kingdom, and that there would be now hardly such a thing as a legal interest in realty remaining: or, should this be deemed a too fanciful hypothesis, why, when or where would the attractive force have been checked? Under such an accumulation of business, could the court itself have lived on?

Mr. Tyrrell, at the 385th page of his Suggestions, apologises for omissions, on the score of "the impossibility of considering more than a small portion of so extensive a subject;" and he subjoins two pages of omitted topics as a sample of what are behind. The commissioners, after an ample catalogue of topics for future consideration, remark, "There are probably many other important subjects within the scope of our commission which have not yet occurred to us, but which we may hope to reach in the progress of a systematic inquiry." *We*, therefore, need not excuse ourselves for pausing here, with the professed intention of attending henceforth step by step upon them. We frankly

forewarn our less practical readers that they will have a wild labyrinth to thread; but historical knowledge seldom fails as a clue; and by keeping constantly in mind some few pervading principles—those, for instance, of tenures, uses and trusts—the inquirer moves on with facility through a mass of seemingly gratuitous contrivances and seemingly conflicting rules, just (if a simile be allowable) as one acquainted with the great thoroughfares of a town, runs little risk of losing his way and easily regains it when lost.

Since the foregoing remarks were written, the following Acts (besides others less directly bearing on the subject) have been passed, principally in pursuance of the recommendations of the Real Property Commissioners, for amending the Law of real property and conveyancing.

2 & 3 Will. IV. c. 71, for shortening the periods of prescription necessary to confer or confirm rights in or over real property.

3 & 4 Will. IV. c. 27, for limiting the periods within which suits or actions touching real property may be brought or prosecuted.

3 & 4 Will. IV. c. 74, for the abolition of fines and recoveries, and the substitution of a simple form of assurance by tenants in tail, married women, &c.

3 & 4 Will. IV. c. 105, for amending the law of dower.

3 & 4 Will. IV. c. 106, for amending the law of inheritance and the rules of descent.

4 & 5 Will. IV. c. 23, for amending the law of escheat.

7 Will. IV. & 1 Vict. c. 26, for amending the law of wills.

4 & 5 Vict. c. 21, for rendering the lease for a year unnecessary.

4 & 5 Vict. c. 35, amended by 6 & 7 Vict. c. 23, 7 & 8

Vict. c. 25, and 15 & 16 Vict. c. 51, for commuting manorial rights and enfranchising copyholds.

8 & 9 Vict. c. 106, for regulating the form and effect of feoffment and other ancient forms of conveyance.

8 & 9 Vict. c. 119, for providing that certain short forms of covenants in deeds shall have the effect of the more verbose forms in common use.

8 & 9 Vict. c. 124, for shortening leases on the same principle as in the last-mentioned act.

The two last-mentioned acts were introduced by the present Chief Justice of England, Lord Campbell, one of the fortunate few who have succeeded in combining the character of a practical lawyer of undisputed eminence with that of an enlightened jurist and popular author. With his wonted sagacity, he has laid his finger on the worst of the remaining blots on the system—the verbosity and tautology of conveyances. Any real property lawyer, acquainted with the value of technical terms, could strike out five-sixths of an ordinary deed without impairing its efficiency; and as it cannot be expected that solicitors (who are not over paid, on the whole) will surrender their main source of profit, the fairest available course would be to adopt some other mode of remuneration, instead of paying them by length, which is tantamount to offering a premium for verbosity. A complete system of registration, which was recommended by the Real Property Commissioners, would speedily cure this abuse, along with many other less prominent abuses and inconveniences; but there are influences at work which will render the carrying of such a measure hopeless until the landed proprietors, as a body, shall be roused to a proper understanding of their true and paramount interest in the matter.

The Principles and Practice

OF

PLEADING.

(*From the Law Magazine of June*, 1828.)

THE PRINCIPLES AND PRACTICE

OF

PLEADING.

BEYOND the pale of the profession, the present law of actions is universally condemned. The mode of calling the defendant into court, the forms of statement to which parties are restricted, the rules of evidence, and the method of enforcing the decree, are all subjected to reproach; but none perhaps to such unmitigated contempt as the principles and practice of pleading. "This mischievous mess," says Mr. Mill, "which exists in defiance and mockery of reason, English lawyers inform us, is a strict and pure and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name" (*a*).

We will endeavour to wipe away some part of the reproach by departing widely from that method of defence which is commonly adopted by the profession. We shall not seek to entrench ourselves in technicality; we shall not assume the necessity of any particular forms, but descend at once from the vantage-ground of precedent and authority and meet our adversaries on principles of abstract jurispru-

(*a*) Supplement to the Encycl. Brit. Art. Jurisprudence.

dence; and we undertake to shew that, although overloaded by perverted ingenuity with much that taste and reason would reject, English pleading is founded upon principles as sound as any that reformers can contrive. We shall expose its faults as freely as we shall claim credit for its advantages. Yet we are convinced that the expense, delay and uncertainty complained of are attributable to the relaxation and not to the strictness of our rules; and that our best exertions should be directed to restore instead of superseding or extending them. This, indeed, is Mr. Brougham's opinion, and the following observations will afford an illustration of his views. He, however, commenced at a point to which we shall not feel ourselves quite justified in proceeding. He gave the lawyers of the olden time credit for sense, a commodity most commonly denied them; and he took for granted the soundness of the foundations of the system, whilst numerous innovators are for demolishing the whole. We, therefore, shall begin the investigation at a somewhat earlier stage; for we have seen, as yet, no commentary on the writer from whom we just now quoted, nor on those who have followed in his train. All that we can venture to assume is, the expediency of ascertaining beforehand the nature of the matter in dispute; and it is surely too obvious for denial, that, if parties were to proceed to trial without any warning but a summons to the court, and without any species of preliminary arrangement,—delay, uncertainty and confusion would result. In such a case the plaintiff's range of proof would be unlimited; the defendant might be equally diffuse; unacquainted with the precise subject of contention, the judge could form no check upon their wanderings, and neither party could be prepared for explanation or reply.

We are agreed, then, as to the necessity of some sort of pleading, and shall hardly differ as to what are its proper

objects; for that system is undeniably the best which brings the parties most speedily to issue on a point material to their difference, which allows no statements but such as are absolutely necessary to the development of the question, which conveys the fullest information with regard to the proofs required, and provides that these shall be as few as possible; and, above all, which accurately distinguishes the nature of the points in dispute, and refers each to its peculiar jurisdiction, without which the benefits of a decision must terminate with the suitor who procured it, as no precedent could be relied on as a guide if fact and law were confounded in the judgment.

By what means these objects are attainable, and what progress towards them our practitioners have made, are the subjects for discussion here, and will perhaps be most easily explained by contrasting the present system with those already tried and those suggested for adoption; and, in the first place, we shall notice a peculiarity which distinguishes the course of proceeding in our courts of common law from that of every other judicature. In these, the allegations of parties are so restrained as to lead spontaneously as it were, and without the interference of the court, to the production of an issue; whilst, in every other system, a comparative laxity of assertion is permitted, each party states his case at large, and, when all the circumstances of the dispute are fully developed, the pleadings are reviewed by the judge, who selects the material points and frames the necessary issues. The rule chiefly instrumental in producing the effect we speak of is, technically expressed, the following: "that after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance" (*a*); the meaning of which will be best explained, and the working best shewn, by an example.

(*a*) Stephen on Pleading, 157.

If A., for instance, were to complain of B., he would set out in writing the ground of his demand, to which B. would be called upon to reply in one of three ways: by objecting to the sufficiency in point of law of the facts alleged (i. e. by demurring); by denying the truth of the complaint (i. e. pleading by way of traverse); or, admitting its sufficiency and truth, by stating facts which prevent the circumstances relied upon by A. from having the effect attributed to them (which is termed pleading by confession and avoidance). If the first course, that of demurring or objecting to the legal sufficiency of the complaint, is chosen, the objecting party is taken to admit the facts, the dispute becomes altogether a question of law, and judgment is given for him in whose favour that question is decided, without requiring any evidence to circumstances. If, according to the second method of proceeding, B. denies or traverses the charge or any essential part of it, the parties are immediately at issue, and a time is fixed for determining the case by proof. But if, declining both of these methods, the defendant confesses the complaint and alleges a new line of circumstances in answer, as that, after the debt became due, it was released to him by A.; then a change takes place in the position of the parties, and A. is called upon in turn to deny the truth or legal competency of the defence, or to allege other facts subversive of the effect of those set out by B.; as, in answer to the defence of a release, that such release was extorted by violence; upon which B. is called upon as before to demur, traverse, or state fresh matter. Thus the disputation proceeds, till either some essential circumstance is affirmed on one side and denied upon the other, or till the parties, mutually admitting the assertions of each other, are at issue as to the legal effect of some one of the pleadings, a conjuncture which in most cases very speedily arrives, and

cannot indeed be long protracted by the utmost ingenuity of a disputant (*a*).

Details of circumstances must occasionally be prolix, as we can neither circumscribe their actual combinations nor ascertain beforehand, and without a knowledge of the evidence, to what an extent an allegation is diffuse; but it is quite impossible to wander from the point or to become illogical without immediate exposure whilst the rule exemplified above prevails. This, however, it is unnecessary to press, as those whose censures we are most anxious to examine, admit the merits of the mode we have described, but deny our courts the praise of following it. They mistake the exception for the rule; they know that a great deal of prolixity has crept in; that various anomalies are discernible; that legal forms appear preposterous to those who are ignorant of the history of our courts; and gladly availing themselves of the facilities for misrepresentation afforded by the intricacies of the inquiry, and often possibly deceived themselves, a certain class of writers have thought proper to inform the public that a whole profession is in league against it, resolved on fostering a practice which has not the semblance of a principle to rest on, but is vague, confused and contradictory throughout. Here, however, they shall speak for themselves, and we trust the reader will pardon the length of the extract in consideration of the weight of the authority.

"What is desirable in the operation of the first stage is, 1*st*, That the affirmations and negations with respect to the facts should be true; and 2*ndly*, That the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes all the securities, which the nature of the case admits of, should be taken for the veracity of the parties. There is the same sort of reason that the

(*a*) A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another. This is fatal.

parties should speak truly as that the witnesses should speak truly. They should speak, therefore, under all the sanctions and penalties of a witness. They cannot indeed in many cases swear to the existence or non-existence of the fact, which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. For the second of the above purposes, namely, that it may be known whether the facts affirmed and denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all investitive and devestitive facts, and all acts by which rights are violated, should have been clearly predetermined by the legislature—in other words, that there should be a well-made code; the second is, that the affirmations and denials with respect to them should be made in the presence of somebody capable of telling exactly whether they have the quality ascribed to them or not. The judge is a person with this knowledge, and to him alone can the power of deciding on matters so essential to the result of the inquiry be intrusted.

"To have this important part of the business done, then, in the best possible way, it is necessary that the parties should meet in the very first instance in the presence of the judge. A. is asked, upon his oath, to mention the fact which he believes confers upon him or has violated his right. If it is not a fact capable of having that effect he is told so, and his claim is at an end. If it is a fact capable of having that effect B. is asked whether he denies it; or whether he affirms another fact, either one of those which, happening previously, would prevent it from having its imputed effect, or in a civil case one of those which, happening subsequently, would put an end to the right to which the previous fact gave commencement. If he affirmed only a fact which could have neither of these effects the pretension of B. would be without foundation.

"*Done in this manner, the clearness, the quickness and the certainty of the whole proceeding are demonstrated.* Remarkable it is that every one of the rules for doing it in the best possible manner is departed from by the English law, and that to the greatest possible extent. No security whatsoever is taken that the parties shall speak the truth; they are left with perfect impunity, aptly by Mr. Bentham denominated the *mendacity-licence*, to tell as many lies as they please. The legislature has never enumerated and defined the facts which give commencement, or put a period to or violate rights; the subject, therefore, remains in a state of confusion, obscurity and uncertainty,

and lastly, the parties do not make their affirmations and negations before the judge, who would tell them whether the facts which they allege could or could not have the virtue ascribed to them; they make them in secret and in writing, each along with his attorney, who has a motive to make them not in the way most conducive to the interests of his client, but in the way most conducive to his own interests and those of his confederates, from the bottom to the top of the profession. First, A., the plaintiff, writes what is called the declaration, an instrument for the most part full of irrelevant absurdity and lies; and this he deposits in an office, where the attorney of B., the defendant, obtains a copy of it on paying a fee. Next B., the defendant, meets the declaration of A. by what is called a plea, the form of which is not less absurd than that of the declaration. The plea is written and put into the same office, out of which the attorney of the opposite party obtains a copy of it on similar terms. The plea may be of two sorts; either 1*st*, a dilatory plea, as it is called, or 2*ndly*, a plea to the action. To this plea the plaintiff may make a *replication*, proceeding through the same process. To the replication the defendant may put in a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder*. This again the defendant may oppose by a *rebutter*, and the plaintiff may answer him by a *sur-rebutter*.

"All this takes place without being once seen or heard of by the judge; and no sooner has it come before him than some flaw is perhaps discovered in it, whereupon he quashes the whole, and sends it to be performed again from the beginning (*a*)."

In the first place, the reader will have the goodness to observe that demonstration in this writer's vocabulary has a very different signification from what it bears in ordinary discourse.

"Done in this manner," (i. e. with a code anticipating all possible combinations of facts, and a judge acquainted with each one of its provisions and fully competent to an extemporary application of them,) "the clearness, the quickness and the certainty of the whole proceeding are demonstrated!"

Now what, we should be glad to know, what scheme or

(*a*) Supplement to the Encycl. Brit. Art. Jurisprudence.

theory may not be proved the best, by assuming that everything is attained which your opponent denies to be attainable? Fit my balloon, an aëronaut might say, with a machine to raise and lower it at pleasure and a rudder to direct its course, and the facility of travelling in the air is clearly and undeniably made out. Give me a place to stand on, said Archimedes, and I will move the world; but unluckily he could not find one, and the world continues as it was. Why, a code like that supposed and argued from is what even Bentham never dared to hope for! We have been told by him that all the libraries of the Continent could not furnish a collection of cases equal in variety, in amplitude, clearness and instructiveness to the English Reports. "Nor," adds he, "to the composition of a complete body of law (in which, saving the requisite allowance to be made for human weakness, every imaginable case shall be provided for, and provided for in the best possible manner), is anything at present wanting but an arranging hand(*a*)."

Some lawyers undoubtedly there are with skill and knowledge sufficient to render almost all this store available. Ask one of these if there are precedents enough to decide even a majority of the cases submitted to him; if he is not often driven to equivocal analogies, and often to bare conjecture or a wavering balance of possible constructions. Every practical lawyer must answer that he is; and yet it is unhesitatingly assumed that no dispute could ever be delayed by doubts as to the legal inference to be drawn from circumstances, except by reason of the remissness of the legislature.

The feasibility of codification, however, is a topic which may be hereafter the subject of an article, and which it is not necessary to decide on now. Although the system recom-

(*a*) Bentham on Codification.

mended by the Encyclopedist cannot produce the whole of predicated result unless in co-operation with a perfect code, although under existing circumstances much time must frequently be wasted in settling legal doubts, it is not the less desirable to bring parties to an issue as cheaply and speedily as possible; and if oral pleading would facilitate the process, it is certainly our duty to adopt it. But before we say one word of its advantages, our readers should be reminded that pleading in the presence of a judge was, in fact, the original practice of our courts, and that it was sedulously adhered to till long experience had made known its imperfections. The parties or their counsel came before the judge exactly as is suggested in the first paragraph of the extract, pursued precisely the same mode of *vivâ voce* disputation, with the same attention to those rules of logic which are deemed sufficient to make everything precise, and which are still the foundation of our system. Should authorities be called for, there are enough of them below to establish the truth of the assertion (*a*); and therefore we are under the necessity of supposing that Mr. Mill was ignorant of the history of our laws, or that he took from thence his beau ideal of procedure, coolly assumed the merit of a discoverer, and then set himself to discountenance a system from which all his knowledge of practical pleading had been borrowed.

We are not contending that the method of coming to issue, which we have sketched and quoted above, is anything more than an ordinary logical operation, familiar even in everyday discussion (*b*); but our proposition is, that no lawyers except the English have reduced it to practice; and that those principles of reasoning, which our adversaries

(*a*) Bl. Com. 293; Reeves's Hist. Chap. 23; Stephen's Plead. 34.

(*b*) See Stephen on Plead. note 29, where an exact description of the process is given from Quinctilian.

triumphantly contrast, form, in fact, the groundwork of our plan. Of course, as far as mere logic is concerned, it matters little whether A. details on oath, or states on paper, the fact which he believes confers upon him a right; or whether B. replies *vivâ voce* to a *vivâ voce* complaint, or in writing to a written one. The legal effect of the statement may be in either case the first subject of inquiry, and the same mode of denial may be used.

But when, say they, the statement is prepared in secret by the attorney or pleader, it is spun out for the augmentation of their fees, stuffed full of irrelevant absurdities and lies, and thence arise the nonsence and prolixity which now disgrace the administration of the law. Appoint a judge to be present at the process, and the evil is remedied at once.

Such is now the usual method of attack, and the practical lawyer will find no difficulty in discovering the mistake on which such arguments proceed. Because statements are prepared in private, and not brought under the immediate consideration of the court until a difficulty is experienced or a flaw is found, it is unfairly and illogically presumed that forms are all at the mercy of the pleader, to be contracted, lengthened or mystified at will. Mr. Mill evidently supposes, or at any rate leads his readers to suppose, that every pleading consists at present of all the seven stages for which the legal vocabulary has names; of declaration, plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter. The truth is, that at least one-half of modern pleadings consist merely of the complaint and a denial of about four lines; that very few contain more than three or four stages; that there is not so much as a precedent of the seventh (the sur-rebutter) in Mr. Chitty's multifarious collection; and all who are familiar with the subject know that the seeming remissness of the courts in leaving to a

certain extent the system to itself, is a proof of its efficiency, a proof that it has advanced far enough to dispense with the cost and trouble of a constant control. Every man who draws a pleading is aware that he must be as accurate in the arrangement of his matter as if in the presence of the judges, before whom his composition would immediately be brought, if not legally and formally drawn up. And why should a judge's time be wasted in useless superintendence? A. states that B. has not paid him the price of goods sold, or has done some damage to his property. If any inaccuracy or legal doubt appears, let the writing be submitted to the court. But if the claim be merely one of everyday detail, the mode of describing which has been fixed incontrovertibly already, it may surely be made and answered as now, without any check but the private interest of the parties, who will be quick enough in appealing to the court when any rule or form is departed from.

In all departments of public business similar expedients are employed for saving time and diminishing expense. It is dangerous we know to allude to the customs of parliament, which will meet with little respect from those whose opinions we oppose; but if the House of Commons were to discuss regularly each private bill it passes, the work would be never at an end, and the whole time of the legislature would be occupied in adjusting the rights of individuals. How then do they evade the inconvenience? Why, by taking for granted that if the parties interested make no objection after receiving due notice of the intended enactment, the provision is necessary and just. A committee is nominated, but all its functions are frequently performed by a single member, who goes through the preliminary forms and reports the conclusions to the House, which takes the whole that is told it upon trust; and a noble field for patriotic indignation such negligence assuredly

affords. Yet the object is arrived at without imposition or trickery of any sort; for all concerned are informed of the proceeding, and watch it step by step, prepared to publish and vindicate their claims when the least attempt to infringe them shall be made. Now it is something like this with the proceedings in a cause. The formal statement of such and such allegations having been made before our Lord the King at Westminster is all confessedly a fiction. Neither in person nor by his judges does his Majesty control the disputation, which is carried on by an interchange of writings, prepared undoubtedly in private, but prepared with reference to principles and rules which circumscribe the discretion of the counsel as strictly as the court could do; nor does it seem to us illogical to suppose that the former practice was gradually disused from a sense of the inconvenience of pursuing it.

"Perhaps," says Mr. Bell, "more injustice and oppression is committed by the undue protraction of litigation in consequence of vague, wavering, unsettled, everchanging statements of fact in a system like the Scottish, than upon the whole by erroneous judgment; and nothing is more certain, than that a want of due care in the preliminary process, so as to bring out the true substantial question for judgment, is the great cause of protracted proceedings. It was on this account that the judges in early times were so watchful of the pleadings of the parties—and it was not in Scotland alone that the whole preliminary process or statement of the pleas proceeded in presence of the judge. It was so in England also, and their perfect system of pleading is the fruit of it.

"In England the pleas which are now digested in the form of declaration, plea, replication, &c., were formerly delivered in open court orally by the party or his counsel; and the judge superintending this operation saw the several

pleas entered upon the record. Indeed the pleadings as they are now drawn in England, bear evidence that originally they were only the minutes of what was orally delivered, being framed as if they were extracts from the record.

"The Year Books still give evidence of the method in which this operation was performed, and no one can look into Plowden's Commentaries without seeing how correctly the matter was argued, and how exactly the parties were kept by the judges to the logical exhaustion of the case. It is only in consequence of the long continued care with which judges superintended this operation, that the system of English pleading was gradually formed, which now works with unerring precision, without the necessity of such superintendence" (*a*).

But how stands the question of expense, and what greater tax is paid for law in consequence of the disuse of the oral method? At first sight the question is against us. Nothing can appear more plausible to an unsophisticated or superficial reader, than the prospect of a brief adjustment arranged at one meeting by the court; no writings to pay for, no pleaders to employ, no demurrers to argue, no formalities to fear. But fair and smoth as it is, a nearer view will dissipate the illusion. In the first place, tribunals must be multiplied to an extent exceeding what any theorist has allowed for. The cases which now come under the consideration of the court are those only in which the application of the law is doubtful, and those which are proceeded with till a judgment is obtained. The number of such is trifling, compared with the cases in which the legal liability is clear and the facts alone are questioned, and

(*a*) "Examination of the Objections stated against the Bill for regulating the Scottish Forms of Process." By G. J. Bell, Esq., Professor of the Law of Scotland in the University of Edinburgh, p. 16.

those which are settled without coming to trial. Yet in a system of oral pleading every one cause without exception, if carried farther than the service of the writ, would receive a share of the attention of the court, and an increase of judges would instantly be called for.

Certainly twelve able judges are more easily procured than fifty, and a difficulty is even at present experienced in filling the bench effectively. But we will suppose this difficulty surmounted and fit tribunals established in every quarter of the country. On one of these the party must attend, and if his statement be strightforward and plain, he may call on his adversary to plead immediately; the question will be adjusted at a single meeting, and a day appointed for determining it by proof. But under such complicated systems as great and prosperous communities possess, there will frequently be claims which no prudent man could venture to assert without procuring professional advice. Skill and knowledge are still requisite to determine how far particular facts are investitive or devestitive of rights, even when all these are skilfully defined; numerous cases would occur in which time would be necessary to consider the complaint and prepare the plea; and if the plea contained a fresh development of circumstances, time would again be asked for to consider these, and thus, with each step of the proceeding, attendances and trouble would increase. We do not deny that in a majority of cases the parties could answer and rejoin immediately, if they would; but if either of them is anxious for delay, he has for it an unanswerable apology; for no tribunal can declare, beforehand, that a party who alleges himself to be taken by surprise is, in fact, attempting to impose upon the court, and quite competent to an extemporary explanation.

It is better, we shall be told, to attend the court, than attend a solicitor, and pay him for his writings besides.

Most certainly, if you can do without writings altogether, and trust entirely to oral explanation. It strikes us, however, that it would be necessary for the judge to note down with accuracy the statements made before him; that each suitor would wish to have a transcript of what he had to answer or to prove; and that a formal record must be filed at the conclusion. Four copies would thus be required, and, if more are charged for now, there is surely no inseparable connection between the system and the abuse. It might have grown up just as well, though oral pleading had never been disused; and might be removed immediately without interfering with any thing but fees.

What then (and this is a chief object of attention), what is the use of the verbiage with which law proceedings abound? and would the presence of a judge prevent it? How happens it that so many absurd fictions are retained? Why, in one court, is it falsely said at the commencement, that the defendant is in the custody of the marshal? in another, that the plaintiff is indebted to the king? Why, in actions of assumpsit, are time and paper wasted in stating promises never made and never cared for in the proof? Why, in actions to recover property improperly detained, is it invariably asserted, that the goods come to the possession of the party by finding, without regard to the real manner of acquiring them? and why are Doe and Roe eternally appearing, whenever an expulsion is complained of, with a long story about a lease and an ouster, of which no one believes a syllable? This certainly is indefensible, and we, at least, are not anxious to retain it. Place all the courts upon a par as Mr. Brougham proposes, and those fictions are immediately disposed of, which are used at present for the purpose of acquiring jurisdiction. Leave out the averment of promises, unless the claim is founded on them. Let the declaration in trover allege merely that the defend-

ant has wrongfully appropriated the property of the plaintiff, and the declaration in ejectment, that the defendant keeps possession of his land. Remodel the forms in this manner, and full as much information will be conveyed as through the medium of the fictions we employ.

What this would save in money, we shall by and by compute. That much would be gained in facility of comprehension, we deny; and as a sort of set-off to the anticipated benefit, we may mention the uncertainty that ensues when wonted modes of construction are departed from; and though, in the eye of refinement and philosophy, legal lore may be antiquated trash, the task of remodelling regulations, applying principles, and anticipating contingencies, always was, and always will be, an undertaking of difficulty and time. But we do not press the objection; we are not to uphold error because its traces are not easily rubbed out; and if common counts are to be retained at all, they should instantly be cleared of their tautology.

In the next place, is it expedient to allow of declarations merely stating, in case of money claims, that the defendant is indebted to the plaintiff for money received to his use, money lent to, or paid for, the defendant, &c. &c. without particularity of time or place, or, in short, any explanation of the nature of the transaction out of which the demand arises?

We own the question to be embarrassing enough, and we are aware that, by allowing the party to call for a more precise description in the shape of a particular, the insufficiency of such statements in affording information is tacitly allowed. Practically speaking, however, a defendant is never taken by surprise, unless by his own remissness; and the only doubt with us is, whether any evil would result from consolidating the particular with the declaration and requiring precision in the last; for since the party is

restricted by the second paper he delivers, it would seem that he may just as well be restricted by the first. Yet, we are unable to arrive at a satisfactory conclusion, that the advantages of both statements in co-operation might be had by adding them together. We know that the ancient strictness, in this respect, was found very frequently oppressive; and we cannot help thinking that the present mode constitutes a middle point between the preciseness of the old system and the vagueness that would follow from a total relaxation of its rules.

The particular, it will be remembered, does not necessarily afford any information as to sums or quantities, which may be enlarged to any extent beyond the proof; time and place are left as uncertain as before, and it is considered sufficiently precise, however inaccurately expressed, so long as some intimation of the nature of the transaction is *bonâ fide* given; a rule too vague by far to form the foundation of a system.

Supposing, for the sake of argument, that you could infuse into the declaration itself just that additional degree of information which the supplementary statement conveys, you would still possess but a loose sort of *formula;* and it is quite impossible to improve it in precision, without proportionally embarrassing the complainant. We shall presently come to the consideration of the doctrine of variances, and find the same men, now contending for strictness, contending as zealously against it. Yet, how can particularity be enforced except by resolving that the proof shall tally with the statement, to entitle the suitor to recover? Time and place, for instance, can only be made material by requiring them to be proved as laid; and if, after insisting on circumstances, you allow of inaccuracy in detailing them, or permit the introduction of extraneous matter, it will be extremely difficult to assign limits to the indulgence.

Yet laws, on the other hand, must make allowance for the occasional imprudence of mankind. Few of us, in the ordinary business of life, consider the transactions we engage in as likely to become the subjects of a law-suit, and note them down accordingly; minor circumstances are frequently mistaken; and justice will be as frequently defeated, if trifling discrepancies between the allegations and the evidence are held sufficient to defeat the claim. On the one side, is the evil of vagueness; on the other, the evil of severity. Make time, place and quantity material, and right is sacrificed to form. Permit a statement to stand good, with which the evidence has no closer connection than that of conveying the same general impression, and the opposing party is frequently in the dark, unless possessed of extraneous sources of information: ingenuity is exerted to mystify the explanation of the case by adding to one part, subtracting from another, and using a circumlocution for a third; false views are given, deceptive colourings put on, and facilities afforded for garbling the evidence and presenting proofs in unexpected shapes; though at the same time it might be difficult to say, that the party complaining of surprise was really ignorant of the transaction intended by the pleading (*a*).

(*a*) The following is an amusing illustration of the mode in which statements may be generalised by the use of middle terms. It is extracted from a bill filed by one highwayman against another, and of course it was necessary to conceal the real nature of the transaction from the court.

John Everett against Joseph Williams. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c., that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, or alehouses, or at markets or fairs. "And your orator and the said Joseph Williams proceeded jointly in "the said business with good success on Hounslow Heath, where they dealt "with a gentleman for a gold watch; and afterwards, the said Joseph "Williams told your orator that Finchley in the county of Middlesex, was a

This, then, is the great problem for solution; and we know no better cure for visionary expectations, than a brief reflection on the nature of these contrasted inconveniences and the results of the attempts to shun them. The ancient particularity was found objectionable, and common counts came in. A sweeping form of denial appeared well fitted to shorten the record, and general issues were almost universally applied. We have nonsuits for variance to exclude the possibility of a surprise, and a multiplicity of counts to exclude the possibility of variance; special pleas to put the plaintiff on his guard, and double pleading for the protection of the defendant. To cover one, the other is unmasked; the dilemma is not to be evaded; and we know of none but limited and partial remedies. Such, for instance, is the consolidation of the common counts; by using which the plaintiff entitles himself to give evidence of almost every species of money transaction out of which a debt can arise, without giving notice of the exact nature

" good and convenient place to deal in, and that commodities were very plen-
" tiful at Finchley aforesaid, and it would be almost all clear gain to them:
" that they went, accordingly, and dealt with several gentlemen for divers
" watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and
" other things; that about a month afterwards, the said Joseph Williams in-
" formed your orator that there was a gentleman at Blackheath who had a
" good horse, saddle, bridle, watch, sword, cane, and other things to dispose
" of, which, he believed, might be had for little or no money; that they ac-
" cordingly went and met with the said gentleman, and after some discourse
" they dealt for the said horse, &c.; that your orator and the said Joseph
" Williams continued their joint dealings together until Michaelmas, and
" dealt together in several places, to wit, Bagshot in Surrey, Salisbury in
" Wiltshire, Hampstead in Middlesex, and elsewhere, to the amount of
" 2,000*l.*, and upwards." The rest of the bill is in the ordinary form for a partnership account. Our authority (" *Westminster Hall*," compiled by the late Mr. H. Roscoe) goes on to state that it was reported as scandalous and impertinent; that the solicitors were attached and fined, and that Jonathan Collins, Esq., who signed it, was compelled to pay the costs; that the plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735, and Wreathcock, one of the solicitors, convicted of robbing Dr. Lancaster in 1735, and transported.

of the claim unless a particular is called for. Yet this vagueness of allegation must continue, however vicious its theory may seem, unless all actions of contract are assimilated, and special assumpsits adopted as the model; a measure which, at first view, seems rational enough. On this head one writer satisfies himself by remarking, "That it is nothing to say, why require particularity in declarations of special assumpsit, and admit generality in actions of trover and money had and received. The answer is, the details are given in one action in the declaration, in the other by the particulars of demand; the end required is effectually ensured by different means." But why rest the point on an equivocal assertion, when a clear distinction may be drawn? When a suitor is required to specify the terms of an express agreement, he knows the limits of his task, and has a standard to refer to; but tell him to describe the circumstances which led to the receipt of his money by another, and all, comparatively, is arbitrary and vague. Take any one of Mr. Brougham's instances and attempt to act upon his hint, and the difficulty will instantly appear (*a*).

(*a*) "Now, observe how various the matters are which may be all described by the foregoing words. In the first place, such is the declaration for money paid by one individual to another, for the use and benefit of the plaintiff; this is what alone the words of the count imply, but to express this, they are rarely, indeed, made use of. 2ndly, The self-same terms are used on suing for money received on a consideration that fails, and used in the same way to describe all the endless variety of cases which can occur of such failure, as an estate sold with a bad title, and a deposit paid; a horse sold with a concealed unsoundness, and so forth. 3rdly, The same words are used when it is wished to recover money paid under mistake of fact. 4thly, To recover money paid by one person to a stakeholder, in consideration of an illegal contract made with another person. 5thly, Money paid to revenue officers for releasing the goods, illegally detained, of the person paying. 6thly. To try the right to any office, instead of bringing an assize. 7thly, To try the liability of the landlord for rates levied on his tenant. What information, then, does such a declaration give? It is impossible, on reading this count, to say which of the seven causes of action has arisen; and it is not merely

In the second and third instances, money is paid on a consideration that fails, or on a mistake. Are all the particulars, now left to evidence, to be set out in a preliminary narration? or how much, and what part of them? In the fourth example, is the illegal contract to be pleaded? In the fifth, the fraud upon the revenue? In the sixth, the title of the claimant? or, in the seventh, are the relation of the parties and the various considerations of which the question is composed?

Suppose, however, these particulars set out; we then become exposed to the penalties of variance; no slight evil certainly, but by no means so great as is commonly supposed. It is quite true that, in an action on an express agreement, the essential parts must be set out, and that unless the evidence substantially supports the statement, the action fails, although a contract and an injury are proved. But it is an error to suppose that a technical variance is fatal. When the proof exceeds or falls below the description of the contract on the record, the sole question for consideration is, whether the excess, or the omission, restrains or in any respect qualifies the terms. The common-sense construction is sought out, and on that the judgment exclusively depends (*a*). All rules must occasionally be harsh to suitors just within them: but if any thing like accuracy is desirable to guard against the chance of a surprise, what maxim more lenient can there be than that which we have just alluded to? Surely it is far better to limit the discretion of the judge by rules, the application of which may be in some measure anticipated and calculated on, than to vest in him an uncontrolled power of declaring at the trial whether statements are precise enough or not;

those seven, for each one of them has a vast number of varieties, which are declared on in the same words."—Speech, p. 70.

(*a*) See Selwyn, N. P. 102, 116, 5th edit.

a power which would be constantly appealed from, because each decision would be looked upon as an arbitrary fiat with no better basis than private opinion; and because no man can be competent to declare how far concealment was the object of one party, or to what extent the other was imposed upon. There should be, moreover, an uniformity of practice in our courts; and what sort of resemblance would there be between the constructions of a judge with the habits of an advocate, and of one nurtured in the mysteries of pleading and convinced of the expediency of strictness?

We would retain, therefore, the present particularity in actions on special contract, with the rules by which it is enforced; though with a full conviction of the evils that spring out of them, and the expensive precautions they require. We allude of course to the employment of several counts in the same declaration, in each of which the same case is described with some slight shades of difference, so as to meet any shape which the proofs may assume at the trial; a custom which has certainly been abused, most frequently from excess of caution, and now and then to add to the expense. The obvious origin of the practice is, the licence given to suitors to join several causes of the same nature, instead of bringing a separate action for each; and so long as this privilege continues, a complainant cannot be compelled to confine himself to a single statement of a single case, as the additional counts could in no case be struck out for similarity without the risk of infringing on the right. But, without reference to this peculiar difficulty, we would permit the same case to be differently stated for the avowed purpose of meeting varieties of proof. Some such mitigating expedient must be employed, or the rules of variance will be too severe; and surprise is effectually excluded, when all the shapes in which the charge can be

proved are clearly presented to the view, and correspond in number with the counts. The expense indeed of such cumbersome machinery is an object of rational alarm; and there are no means of materially diminishing this, except the forbearance of the draftsman and the careful superintendence of the court. A party who employs useless repetitions is liable to the costs of the excess; but the court must exercise a more peremptory check than taxing the pocket of the suitor, who acts entirely by the directions of his professional advisers; and it is really preposterous to suppose, that, when special retainers are of frequent occurrence, and three or four counsel are commonly employed, litigants will voluntarily incur the slightest risk of failure to save a pound or two in pleading.

We have been speaking mostly of declarations in contract, but our remarks are generally applicable. What we have said of common counts on promises, is equally true of the comprehensive forms in trover. Prune away the unnecessary words, and state simply that the defendant has in his possession certain property of the complainant which he has applied to his own use; and trust to the particular to exclude surprise. The conversion is here the main point; like the sale of the goods, the performance of the work, the receipt, payment, or lending of the money, or the accounting, in the other cases in which precision is dispensed with; and these are facts, to elucidate which particularity is highly desirable but may be bought too dear. It is easy enough to say, that, in suing for the price of goods, their number, quality and value should be given; when there is not a man who calls for the improvement but would cry shame on the proceedings of our courts if they gave judgment against the vendor, because he claimed for twenty, and proved the sale of ten; because he dated the transaction in January, and his witness placed it in June; because he

described the sale as taking place in Cheapside, when it actually occurred in Fleet Street; because he valued his property in pounds, and the proof was positive to guineas. Be then critical, but be consistent in your criticism. Enjoy your laugh at the pleader if you will, when, in suing for property, he inserts hundreds for tens; or, in declaring for a wrong by violence, exaggerates a smack in the face into "divers kicks, blows, and strokes on the head, face, eyes, nose, ears, arms, legs, breast, and back;" or the breaking down of a hedge into "breaking down divers gates, fences, and hedges, and trampling upon, consuming, and spoiling the grass and corn of the plaintiff," &c.; or, in an action to recover a cottage and an acre of land, claims "messuages, dwelling-houses, cottages, barns, outhouses, gardens, pasture, arable, meadow, and wood lands." This, we know, is miserable stuff, and may add some shillings to the costs; but you can form no rule to reach it that will not go too far; you cannot control the vagaries of invention, without pressing hard on unintentional mistake.

The Pleas are the next topics of discussion, and these are divided into pleas in abatement, and pleas in bar. The effect of the first is, merely to defeat the pending proceedings; of the latter, that the plaintiff cannot maintain any action at any time in respect of the alleged ground. They succeed each other in the following order (*a*):

1. To the jurisdiction of the court.

2. To the person of the plaintiff; as that he is legally incapacitated from commencing or continuing his suit.

3. To the person of the defendant; as that she is a married woman.

4. To the form of the writ; as misnomer of the plaintiff or defendant, or the misjoinder or omission of parties.

(*a*) We omit the plea to the count because no longer practicable.

5. To the action of the writ; as that it was brought as for a wrong by force, when it ought to have been on a contract.

And lastly, pleas in bar to the merits.

This order must be carefully observed, as, by pleading any one, the defendant is precluded from resorting to those which rank before it. Thus, the second plea admits the jurisdiction of the court; the fourth admits the jurisdiction and the competency of the parties, and so on; but by taking each in regular succession the party may avail himself of all. We say, MAY avail himself, because the employment of all is barely within the range of possibility, and not by any means discretionary in the defendant. The Westminster Reviewer, in allusion to these defences, is pleased to say (*a*), "Being at length driven from all these outposts and obliged to answer the plaintiff's demand, he (the defendant) has still several other expedients in his power for delaying and harassing his opponent." But this gentleman forgot to prove that the grounds of objection thus pleadable are really immaterial or illogically arranged; he forgot to mention, that the objecting party must, in most cases, furnish the means of correcting the mistake, (for instance, a plea of misnomer must state the true name or names, and a plea of misjoinder the proper parties); that if the defendant pleads anything not apparent on the face of the proceedings, nor within the knowledge of the court (i. e. any matter of fact) on which issue is joined and found in favour of the plaintiff, final judgment is given for the latter; though had the point been found against him, it would have concluded, not the merits, but the writ. And lastly, this gentleman thought proper to pass by, entirely, the enactment (*b*), "That no dilatory plea shall be received in any

(*a*) No. XI. p. 46. (*b*) 3 Ann. c. 16, s. 11.

court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court, to induce them to believe, that the fact of such dilatory plea is true." How, therefore, all the outposts could successively be occupied, with such barriers placed around them, except by a concurrence of blunders almost miraculous, we really cannot see; and we are equally blind as to the "other expedients" improperly allowed. One is mentioned, however, and we will take it up here, in order to clear the way for the more solid objections of Mr. Brougham, and because it is very easily disposed of.

The privilege of making objections merely formal, is looked upon as an instrument of oppression, of which the suitor should be instantly deprived; and the objection is made without so much as an allusion to the mode in which the practice is controlled. For any thing to the contrary stated by Mr. Mill, or by his admirer and disciple in the Westminster, one might suppose that no such things as amendments had ever been heard of; that a false step was irretrievable: and that pitfalls were insidiously contrived to entice the unwary to destruction. Yet on referring to the books of practice, it will be found, that many technical inaccuracies are cured by pleading over; that proceedings may be amended at any time before judgment, not merely after the objection has been made, but even after its validity has been discussed: and that, unless a party perseveres in error from downright obstinacy, or thinks proper to contest the point, no case can be decided upon a technical defect (*a*). Thus, taking Mr. Stephen's example, trium-

(*a*) At any time before judgment, in ordinary cases, the proceedings may be amended by a judge at chambers, upon summons calling upon the opposite attorney to shew cause, why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to

phantly cited in the Review, suppose the time of committing a trespass to be omitted in the declaration. The defendant demurs, and points out (as he is obliged to do) the particular fault. Why does not the plaintiff amend? Because he has no merits. There can be no other reason, and it is idle to talk of the injustice of a decision, which the supposed sufferer has forced upon the court. The question, in short, is simply this, whether all rules and formulæ shall be dispensed with, to save suitors the cost and trouble of correcting their blunders, when those blunders are clearly pointed out.

So much for dilatory and technical defences. We now come to pleas upon the merits; and here the attempts made from time to time by the legislature and the judges to diminish the grievance of prolixity, have been productive of the worst results. We have stated already, that a majority of pleadings consist merely of the complaint and a brief denial of its truth; and this is the very evil we complain of. According to the strict principles of pleading, the defendant should make his choice between demurring, traversing, and confessing and avoiding, as explained at the commencement of these remarks. He should have it in his power to put the plaintiff to the proof of the complaint; but new facts and legal objections should

the court. Also, the judge at *nisi prius*, upon application, may allow the record of *nisi prius* to be amended, and may order the clerk of *nisi prius* to amend it instanter, whether the judge who tries the cause be a judge of the court in which the record was made up or not, provided the defect be not in a material allegation, of which the party must have been apprized, and which he might have amended before trial.

After demurrer, general or special, it is usual to give the other party leave to amend, and it has been given, even after demurrer argued, but before judgment, where the justice of the case required it. 2 Archbold's Practice, 262—279.

All technical mistakes and omissions are cured by verdict or judgment by default.

stand alone, and be accurately explained. In many forms of action these principles are still attended to. In covenant, and in debt on instruments under seal, there is, properly speaking, no general issue. The most comprehensive form of denial that can be employed is, that the writing declared on is not the defendant's deed; under which, he can merely contest the fact, or the validity, of the execution of the deed. Any other defence must be particularly set out. In formedon, quare impedit, detinue, and replevin, the plaintiff has notice from the plea of the intended line of defence; and in trespass to land, goods, or for personal violence, there is little reason to complain of its generality. In these actions, the general issue puts the plaintiff to the proof of the act alleged; and, as the case may be, that the lands or goods were his. If the violence was actually committed and the plaintiff legally possessed, and the justification is a licence, right of common, or right of way, or that the act was done in aid of an officer, in pursuit of a felon, or to remove a nuisance, a special plea is necessary. Even then, however, there are occasional departures, owing chiefly to the intervention of the legislature. By express enactment, a distress for rent may be given in evidence under the general issue. Magistrates and most public functionaries are privileged in this respect, and may avail themselves of the general form of denial in actions brought against them for any thing done by virtue of their offices, and shew the special matter in evidence. A provision of the same nature now most commonly accompanies the grant of authority of any sort; and such cases are not improperly excepted, as an undue exercise of power is too notorious to take any one by surprise. But to prevent the possibility of perversion, it might be advisable to compel the officer or magistrate to give notice that he justifies as such, without setting out the precise nature of his authority.

No such partial remedy, however, will cure the vagueness of the usual plea in assumpsit and case, in which law and fact, denial and confession, are confounded. So glaring is the aberration from principle, that we must look about to account for the departure, or we shall find it difficult to maintain that we ever had a plan. The truth is, the application of the action of assumpsit to cases in which no promise has been actually made, is a comparatively modern invention. The proper remedy in such cases was the action of debt, formerly objectionable on account of the precision required in the proof and the privilege allowed to the defendant of clearing himself by wager of law. To evade its inconveniences, the courts resorted to the fiction of implying a promise when a cause of action was established. Thus every circumstance affecting the liability becomes matter of consideration before it can be decided whether a promise has been made or not, and the general issue (non assumpsit) comprises necessarily every species of defence. When pleaded to declarations on actual promises the general issue is not, in principle, so comprehensive; and grounds of discharge, occurring subsequently to the engagement, are not included in the terms of the denial. Yet led away by a supposed analogy, the courts have suffered express assumpsits and implied to be assimilated. With very few exceptions the defendant may now resort to every species of defence, without affording the least hint of his intentions; and (stranger still) he has the option of pleading specially when he thinks proper to lengthen the record.

Now the use of pleading, as we formerly observed, is to throw off superfluous matter, to gain the advantage of mutual admissions and lessen the quantity of proof, to evolve the points of contention, and, by separating law and fact, to draw a broad line of demarcation between the provinces of the jury and the judge. Yet, in an action of

general application, particularly to mercantile transactions (the most complicated perhaps of any), no warning is given, no disentanglement is made; but parties are left to guess the tactics of their adversaries, and grope their way to the encounter as they can. The judge at *nisi prius* is called upon to decide a legal doubt, and thinks proper to postpone it for the court. A plaintiff is tricked by a defence which fair notice would have enabled him to expose, and a new trial is allowed of course. Instead of having a verdict to abide by, the parties come to town with their attorneys, and linger out the better portion of the term; and when they get back, witnesses are to be resummoned, preparations for the assizes made anew, and refreshers administered to the counsel. Delays and costs accumulate; yet because a final judgment is eventually obtained by a long, painful and hazardous procedure, we are gravely informed that, "though it should seem as if much confusion would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other" (*a*).

Experience has shown that the unwillingness of judges individually to decide points of law arising on the circuit, and the frequency of applications to the court for the reversal of such decisions as they venture on, are fruitful sources of procrastination and expense; which would most materially decrease if the strict rules of pleading were restored. It would be better, therefore, to adopt the maxim of singleness to its full extent; and we would rather compel the defendant to take issue on a single point in the declaration or to confess the whole and confine himself to one mode of justification, than proceed any longer in the system we are following. Suppose a case similar to that mentioned in our

(*a*) 3 Bl. Com. 306.

article on mercantile law (*a*), and conceive what defences may be made. When stripped of its complicated machinery, the transaction is neither more nor less than a simple sale; but points of contention may arise, relating either to the quality, quantity, or management of the goods, the conduct of the broker, or the extent of his authority; a bankruptcy, an insolvency, a right of lien, the mode or fact of payment, &c. &c. A release, accord and satisfaction, or a former recovery for the same cause, may also be relied on by the individual on whom the contract is sought to be enforced, with other grounds it would be tedious to particularize. Whatever they are, good pleading would elucidate them, whilst the general issue hangs a cloud upon the whole.

In permitting, therefore, the defendant to put the plaintiff to the proof of all the material averments in his declaration, we certainly go far enough; but when these are logically, they should be legally, admitted, and a plea in avoidance should necessarily confess. The general issue should be restricted to its proper sense, operate simply as a denial, and always stand alone; and defences resting on extraneous matter, on facts subversive of the effects, though consistent with the occurrence, of those relied upon by the plaintiff, should in all cases be specially set out. To the case of an implied assumpsit these suggestions apply but partially, as a simple denial necessarily involves the whole merits; yet

(*a*) The case was this: A mercantile house in England writes to one of the parties abroad, commissioning him to purchase and ship off a certain quantity of foreign produce to be consigned to them. He employs his broker to effect the sale, who makes a bargain, as broker, with the owner of the goods, and stipulates for the delivery of them at a particular place on a specified day, to be thence shipped off to England. The seller gives the broker three months' credit for the price of the goods, and he draws a bill of exchange on his principal for the amount. This is accepted by him and discounted at his bankers' abroad. The bankers again draw upon the firm in England, and they accept the bills upon the faith of the goods consigned.

even here we might do something, by requiring certain established modes of defence (release, accord, payment, &c. &c.) to be specially pleaded. The number of answers to be allowed together is rather difficult to fix. Considering the uncertainty of proof, and how very frequently a case may fail on which the party had every reason to depend, we see no objection to admitting two special pleas to a complaint, without a reference to the court or a preventive check of any kind except the liability to costs; and we may repeat our former observation, that, though attention is distracted by variety, unfair surprises are prevented by an exposure of the utmost that can be proved. In no case, however, should leave be granted to resort to more than two defences, or to plead a special plea in addition to the general issue, except on actual motion and cause shewn. With regard to the replication, too, there is no reason why some such rule should not prevail. If the defendants plead infancy, for example, the plaintiff may reply either, that the defendant was not an infant when the transaction took place, that the goods were necessaries suitable to his degree, or that he promised to pay for them since he came of age. There may be cases when it would be quite equitable to permit each of these points to be made, for the purpose of overthrowing a fraudulent defence; and therefore we would vest in the court the power of licensing a double or treble replication.

One more alteration, and we have done. Mr. Brougham suggests the expediency of allowing demurrers unaccompanied by an admission of facts; an amendment we would certainly adopt, since at present a suitor who is conscious of a material error in the pleading, lies by and takes his chance upon the proof, and then moves in arrest of judgment. When it is no longer necessary to admit the facts, legal objections will be taken at the outset; and the heaviest charge of all, the expense of trial, will frequently be saved.

Having now traced the outline of the system, and commented freely on its prominent defects, we would willingly conclude, were it not for the queries we proposed, and the pledge we gave, at the commencement. We have wandered over an interesting field, and pursued with care an intricate inquiry; but we have kept in mind throughout the points that are wanting to the argument. We know that we have yet to prove that oral pleading is open to prolixity, to formal flaws, and expensive disputation, and that imposing oaths on the litigants themselves would not exclude a multiplicity of allegations nor curtail the proceedings of a suit, without introducing a most oppressive severity. On these particulars we shall be extremely brief; and, at the outset, we are quite willing to admit that there is one high authority apparently against us. Lord Hale was of opinion, that the present practice had been productive of delay. But he, it must be borne in mind, was contrasting oral pleading conducted by counsel, with the verbose precedents and extreme strictness of his times (*a*). Our affair is with very different considerations, with the evils necessarily arising from the *vivâ voce* contentions of the parties themselves, and those of a system like our own, when made consistent with its principles. Mr. Mill will hardly support his views by appealing, with the Chief Justice, to our ancestors, for they depended upon lawyers, to whom the good or evil of their law proceedings is attributable. He must rest his system upon common sense, on the every-day experience of society, and this is the arena on which we hasten to encounter him.

May we first inquire of those who hope to simplify contention by bringing suitors into contact with each other and compelling each to turn pleader for himself, whether their attention was ever drawn to the mode in which men in general are wont to mingle in dispute, to the confusion

(*a*) The middle age of pleading was decidedly the worst.

and vagueness that prevail, to the strange wanderings and irrelevant remarks it is almost always the fashion to indulge in? Did they ever listen to a passionate complaint, or mark the glosses that are put upon a tale when the hero or heroine relates it? Did they ever take instructions for a brief, or act the part of arbitrator? If they have done this, or any part of it, they may well conceive the nature of details which mutual altercation would bring out. The judge might ask A. to mention the precise fact which he believes confers upon him, or has violated, his right, and A. would favour him with ten; or rake up the whole life of his adversary, with the rise and progress of their connection. Check him, and the court would place itself in a predicament in which our readers may now and then have found themselves, that of being extremely eager to sift a story to the bottom, and seeing clearly the impossibility of getting at it without falling in with the humour of the teller. If a man is to be limited in proof to the matter of his preliminary allegations, he will make the charge as sweeping as he can; and the answer will be equally diffuse, with equal claims to be so. The judge, however, must remember or note down the whole, arrange the topics, and fix their essentials; and, unless form and precedent are henceforth to be valueless, must give the statement a regular construction. In short, we impose upon the judge the proper task of pleaders and attorneys. Instead of presenting the kernel of the case, we tell him to extract it from the shell, and expect that he will mark intuitively the remotest bearings of every thing he hears.

It is not, it should be remembered, at a single consultation that the material points of a case can be procured by a solicitor; for a legal liability is much more frequently to be deduced from a chain of circumstances, than found dependent on an insulated fact, and over-anxious clients will

declaim, colour and palliate for hours, even to their own agents. We cannot help thinking, therefore, that men in general would soon discover their own incompetency, and come over to Lord Mansfield's opinion, that he who is his own lawyer has a fool for his client. The failure of a few would teach wisdom to the many; and the result of this project would be the practice of reading in court mere formal statements professionally prepared, to be afterwards copied and recorded as now.

With regard to the imposition of oaths, we have laid down already some principles for deciding on the point, although it is extremely difficult to meet suggestions so vaguely and generally thrown out. To what must the suitor swear? To a belief that all he says is true? or to a belief that the grounds on which he rests his case are all essential to support it (*a*)? In verifying dilatory pleas, an affidavit may be reasonably demanded; because, in each of these, a precise fact is relied upon, and no variety of allegation is required. But we have shewn the reasons of the law of variance, and the mode of mitigating its severity; and no recent writer has ventured to maintain that strict singleness in pleas should be enforced; so that, if an oath more binding is proposed than one to the effect that the party really expects to be aided by his allegations and does not make them for vexation or delay, if Mr. Mill wishes for a more severe restriction, we appeal to our former reasonings against it. If, on the other hand, he would rest satisfied with this; the answer is, its utter inutility. Multifarious statements have always an apology in the proverbial uncertainty of proof; convictions for perjury are out of the question; and we should hope but little from the conscience of a party, who would coolly plan the protraction of a suit, and rest his hopes on the ruin of his adversary.

(*a*) At Athens each party swore to the justice of his case. Jones's Pref. to Isæus, 21.

We have not space for more; but one broad distinction we deem it necessary to draw, as it may serve perhaps to elucidate our views. We think not so much of the direct as of the consequential evils of pleading; not so much of the money paid for writings, as of the expense occasioned by their want of accuracy and fullness. Should the improvements we have alluded to be made, we believe that fewer witnesses and proofs would be required; that new trials, special cases, and extraordinary applications to the courts, would very considerably decrease; but we can hold out small hope of records much shorter than we have. The amendments alluded to by us, and suggested by the writers we have quoted from, are meant to amplify conciseness as well as to cut down tautology. In a declaration for the price of goods, for instance, we might save about two guineas by consolidating the counts; but this saving would be counterbalanced by an additional charge for pleas, were the general issue more sparingly employed.

Pleading, however, with all its faults, is not the bugbear the public may suppose; and to assert that "all the expenses in a suit which are not incurred in summoning or taking the defendant into custody, in employing counsel, and collecting and adducing evidence at the trial, or enforcing the decision of the court, are produced by the present mode of pleading" (*a*); is about as conclusive as to say, that all the expenses of building a house which are not incurred in laying the foundation, raising the walls, putting on the roof, and completing the interior, are incurred by the erection of the scaffolding.

Since the foregoing remarks were written, great changes have been made in the forms and practice of English pleading; and although these have been carried out in too

(*a*) Westminster Review, No. XI. p. 62.

irregular and makeshift a fashion to re-establish its character as a scientific system, it is no longer open to the weightiest of the objections urged against it in 1828. A large amount of positive benefit has undoubtedly accrued from the reforms founded upon the recommendations of the Common Law Commissioners. But public expectation expands with progress; or, as has been remarked by a brilliant and popular historian, what yesterday was an invisible speck, is our goal to-day, and may be our starting-point to-morrow. During the last nine or ten years, an experiment, or a series of experiments, has been simultaneously going on, which has already effected numerous conversions, and may end in shaking the convictions of all rational and honest defenders of the old system of procedure. I allude of course to the County Courts, as remodelled in 1846; for which (as for many other important reforms in the Law) the public are mainly indebted to Lord Brougham. They are the nearest successful approximation to the paternal or domestic tribunal of the Benthamite school: they were the first to demonstrate the expediency of that much dreaded innovation, the *vivâ voce* examination of the parties upon oath; and it seems not at all improbable that they will eventually lead to the greater simplification, perhaps annihilation, of written pleadings properly so called, or even to the gradual discontinuance of trial by jury in civil causes.

In the new County Courts, the only process or procedure is the summons (founded on a plaint) stating the nature of the demand, with (in demands exceeding 40*s.*) the particulars annexed,—as, for example, a copy of a tradesman's bill or the account between the parties. The defendant need not put in any written defence or denial, unless he intends to rely on a set-off, infancy, coverture, statute of limitations, or discharge under a bankrupt or insolvent

Act. In either of these contingencies, he is required to give notice in a simple form prescribed by the Act. If he intends to dispute the liability on other grounds, he appears on the day fixed and makes his defence.

There seems no sound reason why the mode of proceeding should vary with the amount sought to be recovered; and the principal forms of action which are at present excepted from the jurisdiction of the County Courts (for malicious prosecution, libel, criminal conversation, seduction or breach of promise of marriage) are precisely those in which the respective parties are least likely to be taken by surprise for want of fuller or more accurate pleading. At all events, short notices might easily be framed to obviate any apprehended inconvenience or abuse. If, therefore, after a few years longer trial, the County Courts should fully satisfy the wants and expectations of the public, their jurisdiction may be indefinitely extended, and the superior courts will be compelled to follow in their wake. It must be admitted that none of the evils which were very generally anticipated from their establishment have actually ensued, with the exception of the alleged effect upon the Bar; the respectability of which may be amply maintained by restricting it to qualified candidates, and by an improved method of legal education.

It is a curious exemplification of the march of the professional mind, that eminent members of the Common Law Bar, the best part of whose lives have been devoted to the details of practice, should be already speculating on the expediency of replacing the recently amended system of pleading by one compounded of the County Court method and of the system in operation at New York.

Historical Sketch

OF

REFORMS IN THE CRIMINAL LAW.

(*From the Law Magazine of February*, 1835, *with additions.*)

HISTORICAL SKETCH

OF

REFORMS IN THE CRIMINAL LAW.

WHENEVER our national pride rises high on comparing the present social condition of England with that of other countries, it may and should be checked by reflections on the amount of vice and misery which was annually accruing amongst us from bad laws and faulty institutions within less than a century. Recollect, for instance, the state of our prisons before Howard called attention to them, or the demoralizing barbarity of our criminal laws before Romilly undertook the heroic task of mitigating them. We propose to recapitulate the principal steps taken by him and those who immediately followed in his train for this most laudable end, in the hope that we may thereby reflect valuable light on sundry contemplated improvements in our penal system.

At the commencement of the nineteenth century, although Beccaria's famous treatise had made numerous converts(*a*)

(*a*) It seems he was not one of them. "I have just heard," writes Lord Byron from Milan, in 1816, "an anecdote of Beccaria, who published such admirable things on the punishment of death. As soon as his book was out, his servant (having read it, I presume) stole his watch; and his master, while correcting the press of a second edition, did all he could to have him hanged by way of advertisement."

amongst continental jurists, his theory of punishments was little known on this side of the channel, whilst a superficial book, written in a contrary sense, exercised a widespread and most mischievous influence for a period. In Madan's *Thoughts on Executive Justice*, it was argued that every penal code, to be efficacious, should be rigidly enforced; and he proposed to act upon this maxim without adopting the precaution of first adjusting the scale of punishment to the various degrees of guilt or to the feelings of society. This tract was published in 1784. In 1783, the number of malefactors executed in London was 51; in 1785, 97. It was answered by Romilly, but the confutation was little known beyond the limited circle of the most enlightened of his own friends, and Bentham's attempts to inculcate the more liberal doctrine were far from diminishing the prevalent prejudice.

"If any person," says Romilly, in his Diary, "be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some legislative reform on humane and liberal principles. He will then find, not only what a stupid dread of innovation, but what a savage spirit it has infused into the minds of many of his countrymen. I have had several opportunities of observing this. It is but a few nights ago, that, while I was standing at the bar of the House of Commons, a young man, the brother of a peer, whose name is not worth setting down, came up to me, and breathing in my face the nauseous fumes of his undigested debauch, stammered out, 'I am against your bill, I am for hanging all.' I was confounded; and endeavouring to find out some excuse for him, I observed that I supposed he meant that the certainty of punishment, affording the only prospect of suppressing crimes, the laws, whatever

they were, ought to be executed. 'No, no,' he said, 'it is not that. There is no good done by mercy. They only get worse; I would hang them all up at once.'"

Many, who would have rebuked and repudiated such language, were not ashamed to act in its spirit; of which no stronger proof can be given than the opposition offered, so late as 1813, to an enactment for omitting the embowelling and quartering in the punishment of high treason. This was so essential according to the old law, that the judgment against Captain Walcot (concerned in the Rye House plot) was reversed, because it did not direct that the bowels of the prisoner should be taken out and burned *in conspectu ejus et ipso vivente.* The bill was thrown out by the House of Commons on its first introduction, by 75 against 60; "so that the ministers," remarks Romilly, in a contemporary note, "have the glory of having preserved the British law, by which it is ordained that the heart and the bowels of a man convicted of treason shall be torn out of his body whilst yet alive." Romilly carried his point in the following year, although only by way of compromise, for he was obliged to give up the quartering, i. e. the horrid practice of mangling the dead body for the edification of the crowd, which a majority of both Houses insisted on retaining as one of the bulwarks of monarchy. It does not appear that any one insisted on sending the quarters to different divisions of the kingdom, or on sticking the heads on Temple Bar, according to well-received and modern precedents (*a*); but every part of the ceremonial was minutely and learnedly discussed. In allusion to Whitbread's detailed description of a phœnix in one of the real "rejected addresses," Sheridan observed that, "it was a poulterer's

(*a*) There is a well-known anecdote of Dr. Johnson and Goldsmith stopping before Temple Bar to contemplate some heads recently affixed, and Goldsmith repeating, in reference to some dream of future fame in which they had both just been indulging, "Forsitan et nomen nostrum miscebitur *istis.*"

description of the bird." Just so it might have been said of these debates on the punishment of treason, that they were the deliberations of butchers or of dissecting surgeons at the best. But we are anticipating, and must come back to the commencement of the new order of things.

The turning point was a bill brought in by Romilly in 1808 to repeal the statute (8 Eliz. c. 4), which renders it a capital offence to steal privately from the person of another. This bill passed after some opposition and after the enforced omission of the preamble, reciting that "the extreme severity of penal laws had not been found effectual for the prevention of crime;" which would now be almost universally regarded as a truism.

In 1810, Romilly brought in three bills to repeal the Acts which punish with death the crimes of stealing privately in a shop goods of the value of five shillings, and of stealing to the amount of forty shillings in dwelling-houses or on board vessels in navigable rivers. These bills were supported by Wilberforce, Sir William Grant, and Canning; but being opposed by Windham and the ministry, they were thrown out (*a*).

In 1811, the same bills passed the Commons and were thrown out in the Lords, principally owing to the vehement opposition of Lord Ellenborough. "My Lords," he thundered forth, "if we suffer this bill (as to stealing in shops) to pass, we shall not know where to stand, *we shall not know whether we are on our heads or on our feet.* If you repeal the Act which inflicts the penalty of death for stealing to the value of five shillings in a shop, you will be called upon next year to repeal a law, which prescribes the penalty of death for stealing five shillings in a dwelling-house, there being

(*a*) Romilly's speech was published (with additions) as a pamphlet, and was reviewed by Lord Brougham in the Edinburgh Review for February, 1812. (See his Lordship's *Contributions to the E. R.* vol. 3, p. 79.)

no person therein; a law, your lordships must know, on the severity of which, and the application of it, stands the security of every poor cottager who goes out to his daily labour. He, my lords, can leave no one behind to watch his little dwelling, and preserve it from the attacks of lawless plunderers; confident in the protection of the laws of the land, he cheerfully pursues his daily labours, trusting that on his return he shall find all his property safe and unmolested. Repeal this law, and see the contrast; no man can trust himself for an hour out of doors, without the most alarming apprehensions that on his return every vestige of his property will be swept away by the hardened robber. My lords, there are cases where mercy and humanity to the few would be injustice and cruelty to the many. There are cases where the law must be applied in all its terrors. My lords, I think this, above all others, is a law on which so much of the security of mankind depends on its execution, that I should deem myself neglectful of my duty to the public if I failed to let the law take its course."

In 1816, a bill was brought in by the late Michael Angelo Taylor to abolish the punishment of the pillory, except in cases of perjury, and passed.

In 1818, Romilly, after another bootless effort, died. If we estimate his services in the cause by what he actually effected, they have been equalled or surpassed by more than one of the criminal-law reformers who have trodden in his footsteps. But if we appreciate his labours by their moral and ulterior results, he takes rank with the Clarksons, the Wilberforces, the Howards, and the Broughams.

The immediate inheritor of Romilly's mantle was Mackintosh, who, in 1819, being warmly supported by Canning, succeeded in obtaining a select committee "to consider of so much of the criminal laws as relates to capital punishments in felonies." In his speech on that occasion he said,

"I do not propose to form a new criminal code – altogether to abolish a system of law, admirable in its principle, interwoven in the habits of the English people, and under which they have long and happily lived, is a proposition very remote from my notions of legislation. Neither is it my intention to propose the abolition of the punishment of death—I hold the right of inflicting that punishment to be that part of the right of self-defence with which societies as well as individuals are endowed . . . . . The main part of the reform which I should propose would be to transfer to the statute-book the improvements which the wisdom of modern times has introduced into the practice of the law."

The Committee produced a Report recommending the repeal of various capital punishments; and six bills, embodying some of them, were introduced by Mackintosh in 1819-1820. Only three of these passed, namely, the 1 Geo. IV. c. 115, 116, and 117; the last of which repeals the capital punishment for privately stealing in shops.

In the same year (1820), an Act was passed for abolishing the punishment of whipping in the case of females. Mr. Grey Bennet was the originator of it.

In 1822, Sir Robert Peel was appointed Secretary of State for the Home Department. In the June of that year, Mackintosh proposed a resolution that "the House should in the next session take into its serious consideration the means of increasing the efficacy of the criminal law, by abating its undue rigour in certain cases, together with the proper measures for strengthening the police, and making the punishment of transportation and imprisonment effective for the ends of example and reformation." Upon this occasion Sir Robert Peel declared that his attention had been for some time anxiously directed to the subjects of prison discipline, transportation, and the improvement of

the police. In consequence of this declaration, Sir James Mackintosh consented to omit all allusion to those subject, and his resolution, modified accordingly, was carried by a majority of sixteen.

In May, 1823, Sir James Mackintosh moved nine resolutions for the improvement of the criminal law; but Sir Robert Peel, while he acceded in general to the principles expressed by Sir James Mackintosh, objected to the course pursued by him as pledging parliament without sufficient consideration of the subject, and contended that the proper course would have been to bring in bills upon each of the heads included in the resolutions. Several of Sir James's friends acquiesced in this view, and his motion was lost by a majority of ten. "This defeat," says his son and biographer, "the first that had befallen the assertion of the general principle, was the signal to Sir James that the time had arrived for surrendering the superintendence of further reforms into the hands of one, whose position, as a minister, conferred such peculiar facilities of carrying into effect such portions of the more extended views of his predecessors as he could bring himself to embrace; and he did so, assuredly with no disposition to witness, with feelings other than those of extreme satisfaction, the work of a more fortunate labourer in the same field in which he had been so long sowing such good seed. His own failures he knew had been as necessary a part of the complex process by which truth is diffused through the public mind, as the frosts of winter to the fertility of the natural soil. He lived to see them amply compensated, and the propriety of many of these very alterations acquiesced in, to an extent which, at the moment of which we write, he dared scarcely have imagined, and which drew from him the expression—instancing the growth of opinion on these subjects—'that he could almost think that he had lived in two different

countries, and conversed with people who spoke two different languages.' "

In the course of the same session (1823) Sir Robert Peel introduced four Acts(*a*) for effecting some of the improvements suggested by Mackintosh. The first of these Acts was for repealing the capital punishments for the offences of cutting down the banks of rivers, &c., cutting hopbinds, false personation of Greenwich pensioners, and frame-breaking; the second Act, was to enable criminal courts to abstain from passing sentence of death in cases where it was not intended to carry the sentence into execution; the third Act was for abolishing the capital punishments for the offence of stealing or cutting woollen manufactures from the tenters in the night-time, stealing the king's naval and military stores, and stealing goods to the value of 40*s*. or more on navigable rivers, &c.; the fourth Act was for abolishing all the capital offences under the Black Act. In the same session Sir Robert Peel introduced an Act(*b*) for consolidating and amending all the Acts relative to prisons and the system of prison discipline. Sir James Mackintosh also introduced an Act(*c*) for altering the mode of interring persons guilty of suicide.

In 1824, Sir Robert Peel introduced an Act for consolidating and amending all the Acts relative to transportation and the management of the hulks (5 Geo. IV. c. 84). In this year a committee was appointed on the motion of Dr. Lushington to consider the expediency of amending and consolidating the criminal law of England. It was this committee that encouraged Mr. Hammond to prepare his laborious collections, since printed in nine volumes folio. The Report of this Committee is also said to have been in

(*a*) 4 Geo. IV. c. 46, c. 48, c. 53, c. 54; three have been merged in subsequent general acts.

(*b*) 4 Geo. IV. c. 64.

(*c*) 4 Geo. IV. c. 52.

a great part, if not altogether, drawn up by Mr. Hammond. But we are not aware of any of Mr. Hammond's productions having found their way into the Statute-Book, except one, namely, an Act for consolidating the laws relative to the abolition of the slave trade, 5 Geo. IV. c. 113, which occupies forty pages—a curious specimen of consolidation. In the same year (1824), a motion was made by the late Mr. George Lamb, for allowing defence by counsel in cases of felony; this was lost by a majority of thirty, and was renewed the next year with no better fate.

In 1825, Sir Robert Peel introduced the Jury Act (6 Geo. IV. c. 50), which consolidates and amends sixty-five Acts. One of its most important provisions is that which substitutes ballot, instead of selection, in the appointment of special juries in all cases, both criminal and civil. At the close of this year's session, Sir Robert Peel promised to undertake the revision and consolidation of certain branches of the criminal statute law.

In the next year (1826) he introduced an Act (7 Geo. IV. c. 64) for improving the administration of the criminal law in many important particulars. This Act defines in what cases a prisoner may be admitted to bail in felony; requires magistrates to take depositions in misdemeanors as well as felonies; simplifies proceedings against accessories; provides for the trial of offences where the exact locality cannot be ascertained; simplifies the mode of describing the ownership of property in all cases; regulates the subject of costs in criminal cases and of rewards for the apprehension of offenders, and applies, in some degree, the principle of the statutes of jeofails to certain technical errors in indictments.

In 1827, Sir Robert Peel introduced five Acts (7 & 8 Geo. IV. c. 27, 28, 29, 30, and 31). The first of these was merely to repeal, wholly or partly, 137 statutes relating to the different subjects comprised in the four accompanying Acts. Cap. 28 abolishes the benefit of clergy and all its

intricate consequences(*a*), and also alters the old law as to prisoners refusing to plead, challenging above the legal number of jurors, &c. Cap. 29 consolidates and amends the statutes relative to larceny, burglary, embezzlement, breach of trust, and the receipt of stolen property—Cap. 30 the statutes relative to malicious injuries to property—Cap. 31 the statutes relative to remedies against the hundred.

To prove the extent of alteration effected by these Acts and the amount of practical benefit resulting from them, little more is necessary than to compare one of the best Treatises on Criminal Law composed prior to them, with one composed subsequently; but as it is important that their full scope should be present to the mind of the reader, we request attention to a passage from Sir Robert Peel's principal speech in introducing the bills. He is speaking with peculiar reference to the bill relating to Theft:

"I select the laws relating to theft in the first instance, because I consider the crime of theft to constitute the most important class of crime. There are acts no doubt of much greater malignity, of a much more atrocious character than the simple act of robbery; but looking to the committals and convictions for crime, it will at once be seen, that those for theft so far exceed the committals and convictions for any other species of offence, that there can be no question of its paramount importance in the catalogue of offences against society, and that, if the laws relating to this class of offence can be simplified and united into one statute, we shall have made a most material advance towards the revision of our criminal statute law.

"By a reference to the criminal returns for England and Wales, it will be found that in the last year, the year 1825, 14,437 persons were charged with various crimes; of this number not less than 12,500 persons, amounting to *six-sevenths* of the whole number, were charged with the crime of theft.

"There were charged with

Burglary	428
Cattle Stealing	42

(*a*) Doubts having been entertained whether the privilege of peers did not exist still, the 4 & 5 Vict. c. 22, was passed to place them upon a level with commoners in this respect.

Horse Stealing	229
Stealing in a Dwelling-house to the value of forty shillings . . .	265
From the person	835
Robbery on the person on the highway and other places	189
Sheep Stealing	166
Simple Larceny	10,087

"If any other offence be taken, it will be seen that the numbers charged with that offence bear a very trifling proportion to the numbers charged with theft.

"In 1825, the same year in which 12,500 persons were charged with theft, were committed

For the crime of arson . . .	22
For murder	94
For manslaughter	122

"If a longer period be taken, the result will be nearly the same.

"In the last seven years there have been,

Convictions for forgery . . .	331
For murder . . .	121
For perjury . . .	43
For arson	50

while, for simple larceny alone, there have been in the same period not less than 43,000 convictions. I need say no more to demonstrate the immense importance of the crime of theft, considered as a class of crime, and to shew the necessity of establishing, with regard to it, as clear and intelligible a law as it is possible to establish.

"The number of the statutes at present in force relating to this offence, amounts to about ninety-two—they include a period of time extending from the reign of Henry III. from the statute called the Charta Forestæ, passed in the ninth year of that king's reign, to the last year of all, the sixth of his present majesty. The number of these laws, the remote and various periods at which they have passed, will probably create an apprehension that the attempt to simplify their language, to classify their provisions, and to condense them into one statute, is a hopeless undertaking. But, sir, I hold in my hand the visible proof that the undertaking is not hopeless. Here is the draft of a bill which has been printed for the purpose of facilitating the consideration of its details previously to its introduction, and in the short compass of thirty pages, without making any rash experiment to curtail the phraseology of the existing laws, without the omission, I believe, of a single clause, which it is fitting to retain, are included all the provisions of the statute law relating to the offence of larceny."

All the bills were submitted to the judges, and underwent the most careful revisal of some of the most experienced criminal lawyers of the land. We were once favoured with a sight of the drafts submitted to the late Lord Tenterden, and there is scarcely a clause but appears to have undergone some sort of amendment at his hand. Here, again, it may be as well to quote from the speech:

"It has been my good fortune (said Sir R. Peel) to profit by the willing assistance of men who yield to none in respect to general acquirements, to profound knowledge of the principles of law, or to experience in its practice. I owe the preparation of these bills to those gentlemen through whose labour and skill the Jury Act of last session was prepared; to Mr. Hobhouse, the under-secretary of state in the home department (to whom, but for the relation in which he stands to me, I would do much more ample justice); and to Mr. Gregson, a barrister of high eminence on the northern circuit, justly respected by all who knew him (*a*). The bills, thus prepared, have been submitted to all the judges, and from many of those eminent individuals, from Mr. Justice Bayley, Baron Hullock, Mr. Justice Holroyd, Mr. Justice Burrough, and Mr. Justice Gaselee, I have received very useful suggestions. The assistance which has been afforded by the Lord Chief Justice, I cannot sufficiently acknowledge. He has devoted to the minute examination of these measures all the leisure which he could spare from the immediate pressure of his judicial duties; and has, I fear, encroached upon that repose which was essential to the restoration of his health.

"In the profession of the law generally, I have found the utmost readiness to co-operate in the work which I have undertaken. It is the fashion to impute to that profession an unwillingness to remove the uncertainty and obscurity of the law, from the sordid desire to benefit by its perplexity. This is a calumny which I know to be unfounded; for I have never made, in the progress of this work, a single application for assistance to any member of the profession of the law, which has not been received in the spirit which becomes a generous mind, rising above the narrow prejudices of habit and the paltry view to private gain."

In 1828, Lord Lansdowne, who succeeded Sir Robert

(*a*) Subsequently one of the Under-Secretaries of State for the Home Department.

Peel as Home Secretary, and was animated by the same enlightened spirit, introduced an Act for consolidating and amending the statutes relative to offences against the person, including murder, manslaughter, homicide, malicious wounding, infanticide, bigamy, sodomy, rape, unlawful abduction, assaults, &c. &c., and another act for rendering the affirmation of Quakers admissible in criminal cases (9 Geo. IV. c. 31, and 32).

In 1829, Sir Robert Peel, who had resumed his former office, introduced the Act for establishing the new police.

In 1830, Sir Robert Peel introduced an Act (11 Geo. IV. and 1 Will. IV. c. 66), for reducing into one Act all such forgeries as were to continue capital, and for otherwise amending the laws relative to forgery. This act did little in reality towards the mitigation of the law; for although it abolished a multitude of capital punishments, it did so chiefly in those cases in which the law had of late years been but rarely enforced. Yet we are far from undervaluing this description of reform. "The frequent occurrence of the unexecuted threat of death (it is observed by the Committee of 1819) in a criminal code, tends to rob that punishment of all its terrors, and to enervate the general authority of the government and the laws. The multiplication of this threat in the laws of England has brought on them and on the nation a character of harshness and cruelty, which evidence of a mild administration of them would not entirely remove. Repeal silences the objection." It is needless to enter into the particulars of this Act, as the Whig government, in the year 1832, abolished the capital punishment in all cases of forgery, except those of wills and powers of attorney for the transfer of government stock or the receipt of dividends thereon (*a*). The number

(*a*) 3 & 4 Will. IV. c. 123.

of convictions has so greatly increased since the passing of this Act, as to lead superficial observers to suppose that there has been an increase of the crime. They make no allowance for the preceding unwillingness to prosecute and the resulting impunity.

In 1831, the old game laws were abolished by the Whig government (1 & 2 Will. IV. c. 32).

In 1832, all capital punishments under the Mint Acts were abolished by an Act which consolidated and amended the statutes against offences relating to the coin. This measure, which was completed by Lord Auckland, had been commenced by his predecessor in office, Mr. Herries, whose intention it was to ablolish all the capital punishments. In the same year, an Act (2 & 3 Will. IV. c. 62,) was introduced by Mr. Ewart for abolishing the capital punishment for stealing to the value of 5*l.* or more in a dwellinghouse, and for cattle stealing and sheep stealing.

In 1833, the capital punishment for breaking and entering a dwelling-house, and stealing therein, was abolished by 3 & 4 Will. IV. c. 44, introduced, we believe, by Mr. Lennard.

In July, 1833, Lord Brougham being Lord Chancellor, the Criminal Law Commissioners were appointed. Their first Report appeared in 1834, and was followed by several Reports, replete with valuable information, and suggesting numerous important changes both in the body and in the administration of our penal jurisprudence. A representative government, however, renders legislation a task of extreme difficulty when the subject is of a nature to excite popular interest; and many members of parliament, who readily hand over the amendment of practice and pleading in the common law courts to their professional colleagues, think themselves equally qualified to discuss questions of criminal law. Comparatively few of the recommendations of these commissioners, therefore, have hitherto been carried into practical effect.

In 1836, a Bill (6 & 7 Will. IV. c. 114) was passed for enabling counsel for prisoners to address the jury in cases of felony as in cases of treason or misdemeanor. This measure had been powerfully and conscientiously resisted session after session during many years, and it at length passed in consequence of the highly honourable defection of Lord Lyndhurst from the ranks of its opponents; who must admit that it has worked little or none of the mischief they foretold.

In 1837, statutes (1 Vict. cc. 84 to 91 inclusive) were passed, comprising important enactments relating to Forgery; Offences against the Person; Burglary; House-breaking and Stealing in a Dwelling-house; Robbery and Stealing from the Person; Burning and Destroying Buildings, Ships, &c., and Piracy. As regards the first topic, the result is that no forgery of any description has since been punishable with death. By c. 86, also, the punishment of death is taken away in cases of burglary, unless accompanied with direct personal violence; but the general object of these statutes was rather to graduate and classify punishments than to mitigate their severity.

In 1841, Sir Fitzroy Kelly brought in a Bill for abolishing the punishment of death except in cases of treason or murder. But although he supported his views with his usual ability and with the full force of his practical experience and authority, he failed to convince the public or the legislature of their soundness. He succeeded, however, to the extent of abolishing capital punishment in cases of rape, embezzlement, fraudulent use of stamps, returning from transportation in St. Helena, &c., riotous demolition of churches, &c. (See 4 & 5 Vict. c. 56.)

After the passing of this Act, it was the general opinion that the legislature had gone quite far enough in the direction of lenity, and many enlightened men contended that it

had gone too far. "Consider," exclaimed the late Dr. Arnold in his Lectures on History in 1842, "the popular feelings at this moment against capital punishment. What is it but continuing to burn the woods, when the country actually wants shade and moisture. Year after year men talked of the severity of the penal code, and struggled against it in vain. The feeling became stronger and stronger, and, at last, effected all, and more than all, which it had at first vainly demanded; yet still, from mere habit, it pursues its course, no longer to the restraining of legal cruelty, but to the injury of innocence, and the encouragement of crime, and promoting that worse evil, a sympathy with wickedness justly punished, rather than with the law, whether of God or man, unjustly violated."

What adds greatly to the danger of still further diminishing the number of crimes punishable by death, is the unconquerable aversion of the British public to any substitute capable of inspiring an equal, or nearly equal, amount of terror. When capital punishment was temporarily abolished in Tuscany, the culprit of the worst class was condemned to imprisonment for life, in an unhealthy situation, and with a scanty allowance of food. In some countries, direct torture has been added. Another source of embarrassment is the impossibility of long retaining transportation on our list of available punishments, as well by reason of its proved inadequacy and unfitness, as on account of the determination manifested by the penal colonies to throw off that character. A properly graduated scale of effective secondary punishments is therefore the object to which the views and exertions of the reformers of the criminal law should now be mainly directed. For all practical purposes, this is much more required than a digest; for each of the consolidation and declaratory statutes already passed (which comprise nine-tenths of the

operative criminal law) is *pro tanto* a digest; and a transition period like the present, when unforeseen relations of things are constantly giving rise to new penal enactments (like those respecting railways, for example), is ill adapted for a code.

If the old law was unduly severe as regards punishments, on the other hand, the rigid adherence to technical forms and proofs enforced by it was highly favourable to criminals; and several Acts have recently been passed to prevent justice from being so frequently defeated by useless technicalities. See, in particular, 11 & 12 Vict. cc. 12 & 46; 12 & 13 Vict. cc. 11 & 103; 14 & 15 Vict. cc. 19 & 100.

One of the latest improvements proposed on broad general principles, relates to the mode of inflicting the penalty of death. Mr. Gibbon Wakefield stated that, having taken great pains to ascertain the feelings of the mass of spectators of each execution during three years (1827-1830), he was able to assert positively that, in every case but one, the assembled crowd sympathised with the criminal. "The case of exception was that of Esther Hibner, hanged for destroying a parish apprentice by repeated acts of cruelty. On that occasion, the assembled crowd shouted bravos, and clapped their hands, as the woman was launched into eternity. On every other occasion the sympathy and anger of the crowd were expressed by such cries as 'God bless you,' 'Shame, Shame.'" Neither of these states of feeling can be deemed edifying or reformatory; and it has been plausibly maintained that a greater degree of purifying awe or horror would be inspired by private executions, if care were taken to have them duly witnessed, certified and made known. In New York, executions are private; and the Archbishop of Dublin (Whately) in his "Thoughts on Secondary Punishments," recommends that the execution should take

place in the presence of certain persons chosen by lot, who should certify the fact. The subject was brought before the House of Commons by Mr. Rich; and in 1845, Mr. Monckton Milnes renewed the attempt to procure the suppression of public executions as hitherto conducted, but his motion was discountenanced by one party on the ground of its tendency to uphold capital punishments, whilst it was resisted by another as a hazardous innovation, and the discussion was evaded by the ordinary expedient of counting out the House.

At the present time, the criminal law of England is no longer open to the reproach of undue severity or mischievous technicality. It is, generally speaking, administered in a humane, considerate and impartial spirit by able and enlightened judges, who anxiously strive to be consistent and to work in harmony. Their sentences are subject to the revision and control of a watchful Executive, which is liable in its turn to be checked or accelerated in the discharge of its functions by parliament, by public opinion, and by the press. Yet the nation cannot be congratulated on the full attainment of the beneficial effects that might fairly have been anticipated; principally because our penal code, by reason of its fluctuating character and its uncertainty, has hitherto failed to excite the required degree of terror amongst the dangerous classes. No one can now do more than form a guess whether a person found guilty of any stated crime (other than one of the first or worst class) will be banished for life to the banks of the Swan River; or be secluded, with or without hard labour, in a penitentiary for a limited period; or be set free, after a short probation, with a ticket of leave; or (if fortunate enough to attract popular sympathy) be immediately relieved from all the disagreeable consequences of his misdeed. The offender, who calcu-

lates at all, is pretty sure to calculate on the possibility of drawing the best lot in the lottery, and boldly proceeds to gratify his cruelty, his cupidity, or his lust. Hence the occasionally alarming state of our criminal calendar; and future reformers will labour in vain to lighten it, unless they start from the principle that, without fixity and certainty of punishment, every other merit, advantage, or improvement in jurisprudence or procedure must and will fall lamentably short of its aim.

LONDON:

PRINTED BY C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.